Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

CITY OF FERGUSON,

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS OF ST. LOUIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Richard C. Bresnahan
7905 Forsyth Blvd.
St. Louis, MO 63105
Phone: (314) 721-5363
Fax: (314) 721-6485

Priscilla F. Gunn
Counsel of Record
Brian D. Kennedy
RABBITT, PITZER & SNODGRASS, P.C.
800 Market, Suite 2300
St. Louis, MO 63101
Phone: (314) 421-5545
Fax: (314) 421-3144

Attorneys for Petitioner

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

QUESTION PRESENTED

Article III, section 2 of the United States Constitution vests the federal courts with jurisdiction over "cases" and "controversies." For a justiciable case or controversy to exist under the Constitution, the party invoking federal jurisdiction must have standing to assert the claim brought.

The Eighth Circuit Court of Appeals followed a long line of authority from this Court in rejecting a municipal employee's challenge to the constitutionality of a city charter provision which prohibited city employees from "electioneering or contributing money or other things of value" for candidates for mayor or city council. It went on to hold, however that the spouse of the city employee, who was not herself employed by the city, had independent standing to challenge the same charter provision insofar as it prohibited city employees from "indirect" participation in the proscribed political activities. In arriving at its holding, the Eighth Circuit expressly rejected the holdings of the three other circuits which had considered the issue, and dramatically expanded the scope of standing.

The question presented is whether the spouse of a municipal employee who is not herself employed by the city has independent standing to challenge the constitutionality of a city charter provision regulating the local political activity of city employees.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Webber, D.J.) granting in part petitioner's summary judgment motion and granting in part respondent's cross-motion for summary judgment (Appendix ("Pet. App.") 14a-54a) was not published. The court of appeals' opinion (per Richard S. Arnold, J., joined by Loken and Bye, JJ.) affirming in part and reversing in part the judgment of the district court (Pet. App. 1a-13a) is published at 283 F.3d 969. The court of appeals' order denying rehearing and rehearing en banc (Pet. App. 55a) is not published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on March 25, 2002, and denied rehearing and rehearing en banc on May 9, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Although the respondents brought their action in federal court pursuant to 42 U.S.C. §1983, the text of the statute itself is not relevant to the constitutional standing issue presented by this petition.

STATEMENT OF THE CASE

Petitioner is a municipal corporation created by and existing under the laws of the State of Missouri. Since 1954, the City Charter has prohibited municipal employees from engaging in "sponsoring" of or "electioneering" for any person who is a candidate for mayor or city council. The district court upheld the prohibition as to "electioneering" by city employees, and dismissed for lack of standing the constitutional challenge brought by the wife of an employee. The Eighth Circuit affirmed the district court as to the constitutional challenge brought by the city employee, but reversed on the issue of his wife's standing. It held that the wife had independent standing to bring a constitutional challenge against the charter provision, despite the fact that she herself was not a city employee.

The court of appeals' holding merits this Court's immediate review because it dramatically and unnecessarily expands the scope of Article III standing. In addition, the opinion below conflicts with the decisions of other circuits, which have held that spouses and dependent family members of public employees do not have independent standing to challenge the constitutional validity of legislation which is not applicable to them. Finally, the Eighth Circuit's decision effectively ignores the general principles of constitutional and prudential standing set forth by this Court, specifically the requirements that plaintiff allege an "injury in fact", and the doctrine that litigants ordinarily may not assert the rights or legal interests of others.

1. Petitioner is a municipality existing under the laws of Missouri, and is located in St. Louis County, Missouri. It is a charter city with a city manager form of government. Respondents, Lloyd Thompson, Alma Mendez-Thompson (wife of Lloyd Thompson), and Local 2665 of the

International Association of Firefighters brought suit in the United States District Court for the Eastern District of Missouri pursuant to 42 U.S.C. §1983 to challenge the validity of §5.3 of the Ferguson City Charter, which provides as follows:

> Neither the City Manager nor any person holding an administrative office or position under the city manager's supervision shall be a candidate for mayor or city council member or engage, directly or indirectly, in sponsoring, electioneering or contributing money or other things of value for any person who is a candidate for mayor or council. All such persons shal' retain the right to vote as they choose and to express their opinions on all political subjects. Any person violating the provisions of this section shall be removed in the manner provided in the personnel code.

2. Respondents brought suit against the petitioner and Allen D. Gill, the City Manager for declaratory and injunctive relief, as well as monetary damages. Specifically, they claimed that the section violated their rights under the First Amendment of the United States Constitution and §130.028, Missouri Revised Statutes.

3. On cross-motions for summary judgment, the district court, the Honorable E. Richard Webber, granted partial judgment to Respondent Lloyd Thompson by concluding that the term "sponsoring" contained within the Charter is unconstitutionally vague. (Pet. App. 37a). The district court then granted summary judgment to the petitioner on respondent's remaining claims, ruling that §5.3 of the Charter is a valid restraint on electioneering by City employees. (Pet. App. 46a). The district court, however

dismissed all federal claims brought by Respondent Alma Mendez-Thompson and the damages claims asserted by the Association for lack of standing. (Pet. App. 29a). The district court reasoned that the petitioner could take no direct action against Respondent Mendez-Thompson because she was not a city employee, and the challenged Charter provision could not apply to her. Consequently, the district court concluded that she had alleged no "injury in fact, whether actual or threatened," and therefore had no standing to challenge the constitutionality of §5.3 of the Charter. (Pet. App. 29a). The district court observed that to "expand the concept of standing to encompass familial economic interdependence would allow, for example, an employee's spouse and dependents to bring derivative causes of action in almost any suit based on the employee's termination or suspension without pay." (Pet. App. 28a).

4. In a decision filed on March 25, 2002, the Eighth Circuit (per Richard S. Arnold, J.) affirmed the district court's decision regarding the claims brought by Respondent Lloyd Thompson. (Pet. App. 4a). The Eighth Circuit, however, reversed the district court's judgment that Respondent Alma Mendez-Thompson lacked standing. (Pet. App. 9a). The court held that Respondent Alma Mendez-Thompson had standing to assert her own challenge to §5.3 of the Ferguson City Charter because of the alleged chilling of her First Amendment rights based upon a fear that her husband would be disciplined for her political activities. (Pet. App. 9a). Although the Eighth Circuit conceded that wife has "no proprietary interest in the husband's job", and that the injury to her may be indirect and uncertain, it nevertheless reasoned that the effect on wife from husband's termination would be "quite substantial, and can be catastrophic." (Pet. App. 9a).

Because she claimed to have passed up her right to engage in local political activities due to her concern of

resulting discipline to her husband, the court of appeals held that Respondent Alma Mendez-Thompson had an independent cause of action to challenge the constitutionality of §5.3 that was not derivative of her husband's claim. (Pet. App. 9a). The court reached its result, despite acknowledging that Respondent Alma Mendez-Thompson is not subject to the Charter provision because she is not a city employee. (Pet. App. 5a).

5. In a separate concurrence, Judge Loken disagreed with the court's conclusion that Respondent Alma Mendez-Thompson had standing to challenge §5.3. (Pet. App. 12a). He rather recommended that the case be remanded for consideration of whether Respondent Lloyd Thompson could challenge the enforcement of the provision on account of his wife's campaigning activity. (Pet. App. 11a). If Respondent Lloyd Thompson could be discharged for his wife's political activities, the concurrence reasoned that he could challenge the "chilling" effect of the provision on his wife's activities on the ground of overbreadth. (Pet. App. 11a). The concurrence concluded that because the city employee is the only person who can be sanctioned by the City, and any injury to the spouse derives therefrom, for prudential reasons the employee is the better party to bring a challenge. (Pet. App. 12a). To allow a spouse to bring an independent claim could result in multiplicitous claims and inconsistent outcomes. (Pet. App. 12a).

6. On May 9, 2002, the Eighth Circuit denied petitioner's petition for rehearing and rehearing en banc. (Pet. App. 55a). This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The Petition should be granted for two reasons. *First*, the decision of the Eighth Circuit conflicts with the general principles of Article III standing as set forth by this Court, as well as the holdings of the three other circuits which have addressed the issue of whether spouses or dependents of public employees have standing to challenge public employment regulations.

Second, the decision ignores the prudential standing doctrine that plaintiffs usually may not assert the rights or legal interests of others, and affects a drastic expansion in the scope of Article III standing to challenge the constitutional validity of public employment regulations. Moreover, the Eighth Circuit's recognition of a spouse's standing to bring an independent challenge to a public employment regulation was completely unnecessary. The person most directly affected by the regulation, the public employee, had in fact brought a challenge to the regulation, which was in relevant part rejected.

I. The Eighth Circuit's Decision Conflicts with Decisions of this Court and of Other Circuits By Recognizing Plaintiff's Standing in the Absence of Injury in Fact.

The "irreducible constitutional minimum" of the case or controversy requirement in Article III of the U.S. Constitution contains three elements: (1) the plaintiff must have suffered an "injury in fact" that is "concrete" rather than "conjectural or hypothetical"; (2) the plaintiff must show that there is a "causal connection between the injury and the conduct complained of"; and (3) the plaintiff must show that it is "likely" and not merely "speculative" that the injury

complained of will be "redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130- 2136-37 (1992). The requirement states a constitutional limitation on judicial power, "not merely a factor to be balanced in the weighing of so-called 'prudential' considerations." Valley Forge Christian College v. Americans United for the Separation of Church and State, 454 U.S. 464, 475 102 S.Ct. 752, 760 (1982). As this Court has held, the "injury in fact" test requires more than injury to a legally cognizable interest; it requires that the party seeking review himself be among the injured, and that the injury be actual or imminent. Lujan, *supra.* A threatened injury must be "certainly impending", Whitmore v. Arkansas, 495 U.S. 149, 158, 110 S.Ct. 1717, 1724 (1990), and the allegations must be "particular and concrete". Steel Co. v. Citizens for a Better Environment, 118 S.Ct. 1003, 1020 (1998). Allegations of a subjective "chilling" effect on the exercise of First Amendment rights are not an "adequate substitute for a claim or specific present objective harm or a threat of specific future harm". Laird v. Tatum, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-26 (1972).

When a suit challenges the legality of government action or inaction, the nature and extent of facts that must be averred in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. Lujan, 504 U.S. at 562. If the plaintiff's asserted injury arises from the government's allegedly unlawful regulation of someone else, "much more is needed." Id. In such situations, standing is not precluded, but it is ordinarily "substantially more difficult to establish." Id. (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

This case arose from a challenge to the constitutionality of §5.3 of the petitioner's city charter, which prohibits city employees from directly or indirectly engaging in

"sponsoring, electioneering or contributing money or other things of value for any person who is a candidate for mayor or council". Beginning with its decision in United Public Workers of America v. Mitchell, 330 U.S. 75 (1947), and continuing with United States Civil Service Commission v. National Assoc. of Letter Carriers, 413 U.S. 549 (1973), and Broadrick v. Oklahoma, 413 U.S. 601 (1973), this Court has consistently upheld prohibitions against many forms of political activity by public employees on the federal and state level. For decades, municipalities as well have relied on this line of authority in enacting restrictions on the ability of public employees to take an active part in campaigns for city office.

The Eighth Circuit followed the long line of authority cited above in upholding the prohibition of §5.3 against "electioneering" and "contributing" money for city candidates on the constitutional challenge brought by Respondent Lloyd Thompson, a city employee. The court, however concluded that his wife, Respondent Alma Mendez-Thompson, had standing to assert her own challenge to §5.3 of the Ferguson City Charter because of the alleged chilling of her First Amendment rights resulting from her fear that her husband would be disciplined for her political activities. (Pet. App.9a).

Although the court of appeals expressly conceded that wife had "no proprietary interest in the husband's job", and that the injury to her may be indirect and uncertain, it nevertheless reasoned that the effect on wife from husband's termination would be "quite substantial, and can be catastrophic." (Pet. App. 9a). Because she claimed to have passed up her right to engage in local political activities based on a concern of resulting discipline to her husband, the court of appeals went on to conclude that she had an independent cause of action to challenge the constitutionality

of §5.3 that was not derivative of her husband's claim. (Pet. App. 10a). The Eighth Circuit reached its result, despite its express recognition that Respondent Mendez-Thompson is not subject to the Charter provision because she is not a City employee. (Pet. App. 5a).

It is evident from the Eighth Circuit's decision that the sole causal nexus between wife's indirect injury and the petitioner's conduct in enforcing the prohibition against "indirect" campaigning in violation of §5.3 is her husband's employment by the city. Because the court of appeals upheld the direct prohibitions against electioneering contained in §5.3, Respondent Alma Mendez-Thompson could only prevail on the merits of her "independent" challenge to §5.3 if she has more of an interest in her husband's employment than he has. This cannot be the law, yet it is the necessary implication of the Eighth Circuit's decision. Indeed, the court of appeals' decision presumes that Respondent Alma Mendez-Thompson could have asserted a constitutional challenge to §5.3 even if her husband had not brought a claim.

No previous decision of this Court has directly addressed the issue of spousal standing. The general principles of standing jurisprudence set forth above are well-established, and the recognition of an independent cause of action by a spouse based upon fears that the employee spouse will suffer workplace discipline is inconsistent with these principles.

In Laird v. Tatum, *supra*, this Court held that plaintiffs did not have standing to bring a constitutional challenge to a program under which the U.S. Army gathered intelligence information regarding civilian political activity. In that case, the plaintiffs alleged that because they did not know for what purposes the Army would use the information in the future, they were "chilled" in the exercise of their First Amendment rights. After reviewing the applicable case law, this Court

observed that while a number of cases recognized standing where injury to First Amendment rights arose from the "chilling" effect of government regulations rather than the direct prohibition against the exercise of those rights, in each such case "the challenged exercise of power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging". Id. at 11. Nevertheless, none had "eroded" the "established principle" that a litigant seeking to invoke the jurisdiction of a federal court in challenging government action must "show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action". Id. at 13 (*quoting* Ex parte Levitt, 302 U.S. 633, 364, 58 S.Ct. 1 (1937)) (emphasis added). This Court then held that an allegation of a "subjective chill" without an allegation of specific present objective harm or a threat of specific future harm was insufficient to create a justiciable controversy. Id. at 13. Because the plaintiffs had alleged that their fears were based on the mere possibility of future misuse of the information in some undefined manner, this Court held that they had not presented a judicially cognizable claim. Id. at 13-14.

From the cases discussed above, it follows that a legally cognizable injury may conceivably result from a "chilling" effect of a prohibition rather than a direct prohibition on the exercise of First Amendment rights. The injury, however that would result from violating the regulation nevertheless must be the direct result of the government's action, and the complainant must be subject to the challenged "regulations, proscriptions, or compulsions". Laird, 408 U.S. at 11-12. While Respondent Mendez-Thompson alleged a "chilling" effect from §5.3 rather than a direct prohibition on her activity, the injury alleged is "indirect, in that it occurs

initially to the husband, through loss of his job". (Pet. App. 9a). In addition, there was no dispute below that she was not subject to the prohibitions contained in §5.3. The alleged "chilling" effect notwithstanding, a spouse who is not subject to a challenged proscription simply cannot show the direct injury or threat of injury needed to support standing under Laird. The mechanism for the injury to the dependent or interdependent spouse is the imposition of sanctions on the employee spouse.

The Eighth Circuit observed that based upon Respondent Alma Mendez-Thompson's deposition testimony, there was an evidentiary basis for the finder of fact to conclude that her concerns about the scope of §5.3, in particular the prohibition on an employee's "indirect" participation in the proscribed political activity, prevented her from participating in campaigning activities in the City of Ferguson. (Pet. App. 5a). Yet Respondent Alma Mendez-Thompson did not provide specific information concerning the candidates for whom she did not campaign, nor did she provide any "concrete plans" or specification of the future campaigning activities in which she planned to engage. In Lujan v. Defenders of Wildlife, *supra*, this Court held that statements of an intention to return to an endangered species habitat at some indefinite time in the future was insufficient to show the "actual or imminent" injury required for "injury in fact". Petitioner respectfully suggests that Respondent Alma Mendez-Thompson's alleged intention to participate generally in campaigns in the City of Ferguson falls in the same category of intention to engage in indefinite activity. By extending standing to her, the Eighth Circuit's decision departs from the "injury in fact" element necessary for standing under Lujan.

Even if the court of appeals may have been correct in writing that certainty of injury is not required in the First

Amendment context (Pet. App. 9a), injury in fact for standing purposes requires that there be some way to determine the timing and type of injury to the complainant. In Johnson v. State of Missouri, 142 F.3d 1087 (8th Cir. 1998), the court held that state prisoners failed to show "injury in fact" from a statute penalizing the filing of frivolous lawsuits, because they did not show that sanctions had been imposed or would be imposed. Id. at 1089.[1] Based upon the evidence in the record below, there is no way to determine the timing and type of injury allegedly sustained by Respondent Mendez-Thompson. Because standing is a threshold issue under Article III, petitioner should not be forced to litigate the case on the merits in order to demonstrate that Respondent Alma Mendez-Thompson has no standing to challenge §5.3.

In addition to being inconsistent with the decisions of this Court, the Eighth Circuit's decision is out-of-line with the decisions from the other circuits which have addressed the same issue. The three circuits which have considered the question of spousal or dependent standing in the First Amendment context have all held that spouses and other dependent family members only have standing to assert the same claims as those family members directly affected by government regulations or retaliatory action, i.e., that their claims were derivative. *See* Biggs v. Best, Best & Krieger, 189 F.3d 989 (9th Cir. 1999); Horstkoetter v. Department of Public Safety, 159 F.3d 1265 (10th Cir. 1998); English v. Powell, 592 F.2d 727 (4th Cir. 1979). The court of appeals acknowledged that it was rejecting the holdings of these cases, but justified

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[1] Similarly, in Kounitz v. Slaaten, 901 F.Supp. 650 (S.D.N.Y. 1995), the court addressed a claim that the spouse of a county employee had been chilled in the exercise of his First Amendment rights by the termination of his wife after he complained to her supervisor of her mistreatment. It held that the husband had not alleged a "specific present objective harm or threat of specific future harm" to demonstrate the "injury in fact" necessary to support his standing to invoke federal jurisdiction. Id. at 654.

its decision because the injury to wife, while indirect is "nonetheless real and tangible". (Pet. App. 9a).

In English v. Powell, 592 F.2d 727 (4th Cir. 1979), an employee of a county liquor control board and his wife brought §1983 actions after the employee was demoted, allegedly because his wife complained to board officials about their treatment of her husband. Id. at 730. There was evidence that the wife had to take a job in order to supplement the family's income after her husband was demoted. The wife claimed that she was "chilled" in exercising her First Amendment rights by a board member's statement that her husband would be terminated if she made any more complaints to the board. The Fourth Circuit held that wife's injuries were "too indirect and speculative" to support her standing to challenge her husband's demotion. The court observed that "[i]t is a novel theory that a wife possesses such a proprietary interest in her husband's position that a decrease in his salary gives her an actionable claim." Id.

In Horstkoetter v. Department of Public Safety, 159 F.3d 1265 (10th Cir. 1998), the wives of two highway patrol officers brought a §1983 action after the husbands were ordered to remove political signs from the yards of their private residences. Id. at 1269-70. The wives alleged that they were forced to remove the signs in order to protect their husbands' jobs with the state. Id. at 1279. After noting that the departmental policy could not apply on its own terms to the wives, who were not employees, the Tenth Circuit held that they had not alleged "injury in fact", and that they therefore only had standing to assert the same claims as their husbands. Id.

In Biggs v. Best, Best & Krieger, 189 F.3d 989 (9th Cir. 1999), an attorney was fired from her position with a private law firm that performed services of city attorney. She and

her husband and daughter brought a §1983 action against city council members who allegedly threatened to fire the law firm if they did not cease their political activities. Id. at 992. The husband and daughter both claimed that because the council members attempted to silence their political activities by exploiting their desire to protect the wife/mother's position at the law firm, they had their own separate claims. Id. at 997-98. Citing Horstkoetter, *supra*, the Ninth Circuit held that for purposes of Article III standing, the loss of another family member's income only sufficed to give the husband and daughter standing to raise the same claims brought by the family member who could be sanctioned directly. Id. at 998.

The Eighth Circuit's only basis for declining to follow the three other circuits which have considered the issue of spousal standing was that the injury is "nonetheless real and tangible". Petitioner respectfully suggests that the court of appeals focused on the wrong factors. (Pet. App. 9a). However "real" or "tangible" the effects might be after they have occurred, the proper focus for Article III standing is on the certainty and imminence of a particularized, objective injury resulting from the defendant's conduct before it occurs. This Court's prior decisions involving Article III standing demand nothing less.

II. The Eighth Circuit's Decision Is Contrary to this Court's Prudential Standing Doctrines, and Would Expand The Scope of Standing to Include Economically Dependent or Interdependent Spouses in Virtually All Cases.

In the event that Respondent Alma Mendez-Thompson may have established an injury in fact so as to satisfy the constitutional minimum to have standing under Article III,

recognition of her standing to challenge §5.3 would nevertheless be contrary to the doctrines of prudential standing. In particular, recognition of her standing would run counter to the presumption that litigants may not assert the rights or legal interests of others.

Even if the plaintiff meets the minimal constitutional requirements of standing, there are prudential limits on the federal judiciary's exercise of jurisdiction. Bennett v. Spear, 510 U.S. 154, 117 S.Ct. 1154, 1161 (1997). One of those prudential restraints is the general presumption that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 500, 95 S.Ct. 2197, 2206 (1975).

While it purported to grant Respondent Alma Mendez-Thompson standing to assert her own rights, the Eighth Circuit's decision effectively extended to her the right to assert her husband's First Amendment rights. Where plaintiff's allegation of injury from government action is based upon conjecture and is causally dependent upon injury to third persons, the Court will apply the presumption against third party standing. *See, e.g.*, Warth v. Seldin, *supra*. In Warth, the Court rejected on prudential grounds the standing of taxpayers who alleged that there suffered injury based upon the allegedly exclusionary zoning practices of the City of Rochester. 422 U.S. at 509-510. The Court regarded the allegation that the City's zoning policies created an increased demand for public housing and thereby increased the tax burden on the plaintiffs as nothing more than "an ingenious academic exercise in the conceivable." Id. at 509 (*quoting* United States v. SCRAP, 412 U.S. 669, 688, 93 S.Ct. 2405, 2416 (1973)). The Court held that, however artful their pleading, the plaintiffs were in actuality asserting the rights of third persons. Id. The present case is analogous, in that

Respondent Alma Mendez-Thompson's allegation of injury from §5.3 was causally dependent upon injury to her husband.

The Eighth Circuit's decision offered reassurance that the court was not holding "that a spouse has standing to assert a claim any time the other spouse is injured". (Pet. App. 5a). Petitioner, however, respectfully submits that the court's concern would be the consequence of its decision. If the possibility of discipline against the employee, and consequent damage to the spouse's economic situation is the only factor which converts the non-employee spouse's voluntary decision to forego certain political activities from a non-justiciable claim to a justiciable claim, then it is difficult to see how a spouse would not have standing to assert a claim any time the other spouse is injured. The cautionary note in Knoll v. City of Chesterfield, 71 F.Supp.2d 959 (E.D.Mo. 1999), which the district court in the case at bar regarded as persuasive, bears repetition. "To expand the concept of standing to encompass familial economic interdependence would allow, for example, an employee's spouse and dependents to bring derivative causes of action in almost any suit based on the employee's termination or suspension without pay." 71 F.Supp. 2d at 961. Despite the court of appeals' protestations to the contrary, its decision offers no guidance as to where the line is to be drawn between independent and derivative spousal standing. The decision therefore opens up the floodgates to independent challenges to employment actions brought by spouses of employees.

It is worth noting that the Eighth Circuit's recognition of a spouse's standing to bring an independent challenge to a public employment regulation of political activity was completely unnecessary. Because he was a city employee, Respondent Lloyd Thompson was the person most directly

affected by the regulation, and he did challenge the regulation. At least as to the "electioneering" prohibition, §5.3 of the city charter was sustained. Respondent Alma Mendez-Thompson had no greater interest in the restricted political activity than her husband. Consequently, there is absolutely no reason to believe that the outcome of her First Amendment challenge to §5.3 would be any different from her husband's challenge.

The Eighth Circuit's conclusion is not supported by the record, and is inconsistent with established principles of standing jurisprudence. The court of appeals erred in not following the decisions of the other circuits which have considered this question, and which are more faithful to the constitutional and prudential foundations of standing as declared by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD C. BRESNAHAN
7905 Forsyth Blvd.
St. Louis, MO 63105
Phone: (314) 721-5363
Fax: (314) 721-6485

PRISCILLA F. GUNN #3294
Counsel of Record
BRIAN D. KENNEDY #92685
RABBITT, PITZER &
SNODGRASS, P.C.
800 Market, Suite 2300
St. Louis, MO 63101
Phone: (314) 421-5545
Fax: (314) 421-3144

Attorneys for Petitioner

(Any footnotes trail the end of each document.)

No. 01-2277EM

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

International Association of Firefighters of St. Louis, Franklin and Jefferson Counties, Local 2665; Lloyd Thompson; and Alma Mendez-Thompson,
Appellants,

v.

City of Ferguson and Allen D. Gill,
Appellees.

December 13, 2001, Submitted

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COUNSEL:
For INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, OF ST. LOUIS, FRANKLIN AND JEFFERSON COUNTIES, LOCAL 2665, LLOYD THOMPSON, Plaintiffs - Appellants: Jeffrey Edward Hartnett, John H. Goffstein, Julia R. Engelhardt, BARTLEY & GOFFSTEIN, St. Louis, MO.

For CITY OF FERGUSON, ALLEN D. GILL, Defendants - Appellees: Priscilla F. Gunn, Brian D. Kennedy, RABBITT & PITZER, St. Louis, MO. Richard C. Bresnahan, LANG LAW OFFICE, St. Louis, MO.

JUDGES:
Before LOKEN, RICHARD S. ARNOLD, and BYE, Circuit Judges. LOKEN, Circuit Judge, concurring.

OPINIONBY:
RICHARD S. ARNOLD

OPINION:

RICHARD S. ARNOLD, Circuit Judge.

The International Association of Firefighters of St. Louis, Franklin, and Jefferson Counties, Local 2665, Lloyd Thompson, a Ferguson resident and employee, and his wife, Alma Mendez-Thompson, challenged a provision of the Charter of the City of Ferguson which prohibited certain city employees from sponsoring, electioneering for, or contributing money to any candidate for mayor or city council. The plaintiffs claimed that the provision abridged their freedom of speech in violation of the First Amendment. The District Court granted summary judgment for the plaintiffs as to the sponsoring prohibition contained in the challenged provision, but granted summary judgment in favor of the City of Ferguson on all other claims. The plaintiffs Lloyd Thompson and Alma Mendez-Thompson appeal the decision of the District Court. We affirm the judgment insofar as it upheld the challenged provision as applied to Lloyd Thompson. The District Court also dismissed Alma Mendez-Thompson's separate claim for lack of standing. As to that issue, we reverse and remand for further proceedings.

I.

The City of Ferguson is a charter city located in St. Louis County, Missouri. In 1998, the City approved the current city charter. This charter includes the following provision:

Neither the city manager nor any person holding an administrative office or position under the city manager's supervision shall be a candidate for mayor or city council member or engage, directly or indirectly, in sponsoring, electioneering or contributing money or other things of value for any person who is a candidate for mayor or council. All such persons shall retain the right to vote as they choose and to express their opinions on all political subjects. Any person violating the provisions of this section shall be removed in the manner provided in the personnel code.

Appendix of Appellant (App.) 58 (quoting Section 5.3 of Ferguson City Charter). The plaintiffs contend that the provision violates their First Amendment rights to freedom of speech.

The District Court determined that the sponsoring provision, which prohibited employees from directly or indirectly sponsoring candidates for mayor or town council, was void for vagueness and enjoined future enforcement of that provision. This issue is not before us. All other prohibitions contained in the challenged provision were held to be constitutional as applied to the plaintiff Lloyd Thompson. The Court also determined that Alma Mendez-Thompson lacked standing to challenge the provision because she was not an employee of the City, and the City could take no action against her. The pendent state claim was dismissed by the District Court. [n1]

II.

This Court has reviewed constitutional challenges to provisions such as the one contained in the Ferguson City Charter in the past. Specifically, in Reeder v. Kansas City Bd. of Police Comm'rs, 733 F.2d 543 (8th Cir. 1984), cert. denied, 479 U.S. 1065, 93 L. Ed. 2d 1000, 107 S. Ct. 951 (1987), we upheld a ban on political contributions by officers or employees of the Kansas City Police Department. Id. at 548. Though we did state that a restriction such as this "does abridge the freedom of speech in a literal sense," it was constitutionally permissible. Id. at 547. We noted that the Supreme Court has allowed the government to impose "substantial restrictions on [the] political activity" of its own employees and that First Amendment rights "must yield on occasion to the demands of public safety." Id. at 547. See Broadrick v. Oklahoma, 413 U.S. 601, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973). Though the case at hand does not involve only a prohibition on funding, but also a prohibition on electioneering by government employees, the rationale used and the outcome reached in Reeder control the decision in this case. The District Court properly granted summary judgment to the City on Lloyd Thompson's First Amendment claim.

The District Court analyzed the justifications provided by the City to support the provision at issue. The Court determined that the provision, which affected only certain government employees, was "necessary to protect against the erosion of public confidence in the impartiality of the provision of Government services, in preserving the fairness of City elections, and in preserving the efficiency of the operations of the City." Int'l Ass'n of Firefighters v. City of Ferguson, No. 4: 00CV00241, slip op. at 34 (E.D. Mo. April 17, 2001). Moreover, the Court noted that the restriction is narrowly tailored, because it applies only to local elections for mayor and council. Because greater restrictions may be placed on government employees than the public at large, the provision was held to be constitutional. Id. at 34-35; see Kelley v. Johnson, 425 U.S. 238, 245, 47 L. Ed. 2d 708, 96 S. Ct. 1440 (1976). We agree with the decision reached by the District Court.

III.

The District Court dismissed Ms. Mendez-Thompson's separate claim for lack of standing. She is not an employee of the City, and the challenged provision of the charter clearly does not apply to her. It does apply to her husband, but she must assert her own rights, not his. However, Ms. Mendez-Thompson claims that the City is threatening to interpret Section 5.3 in such a way as to chill her own exercise of First Amendment rights. In the past, when she lived in New York, she did participate in political activities, specifically a campaign for a councilwoman. App. 159. She also worked in campaign offices and made telephone calls on behalf of candidates. Id. at 160. After moving to Missouri, she participated in the re-election campaign of a candidate for city council in Calverton Park. But, in her view, the charter provision in question in this lawsuit has prevented her from participating in similar activities in the City of Ferguson, because she feared it would jeopardize her husband's position as a city employee. Id. at 161. Her lawyer wrote a letter to the City inquiring about its interpretation of Section 5.3, specifically, whether her husband might suffer discipline if she ran for office, electioneered, or contributed money to a candidate for mayor or council. The City did not answer this

letter. Ms. Mendez-Thompson has "felt intimidated to do anything of [a political] nature." Id. at 161.

As we have said, the charter obviously does not apply to Ms. Mendez-Thompson. The prohibition against "indirect," as opposed to "direct," political activities, however, does apply to Mr. Thompson. The Mayor, Steven Wegert, took the position, when testifying at a deposition under oath, that if an employee's spouse or children placed a yard sign in front of the house where they were residing with the employee, the employee would be considered to be "indirectly" engaging in political activity prohibited by the Charter. App. 177. A political contribution made from a couple's joint bank account would presumably be subject to the same logic. So it seems that Ms. Mendez-Thompson's apprehension that political activities on her part might be used to discipline her husband is not unreasonable, or, at least, that a sufficient issue as to its reasonableness has been made out to make summary judgment on the question inappropriate.

The political activities at issue here are at the core of the First Amendment. The City does not claim that it can directly regulate Ms. Mendez-Thompson's activities, but it does seem to claim that it can discipline, perhaps even discharge, her husband on account of her activities. If her testimony is believed, as it must be in this summary-judgment context, she has a reasonable apprehension that her husband might be economically disadvantaged in retaliation for political activities on her part. Does this claim assert her own rights, or merely those of her husband? We think it asserts her own rights. She has her own rights to participate in political activities, and if her husband were disciplined or lost his job, the economic adverse effect on her would be clear, especially, perhaps, in view of the fact that they have a joint bank account. We are not holding that a spouse has standing to assert a claim any time the other spouse is injured. But here, Ms. Mendez-Thompson is herself injured by having to give up, or hesitating to exercise, her First Amendment rights, and by the consequent loss of her husband's ability to provide the mutual support that the law imposes as a duty on both spouses.

Do these facts fit the law of standing? We think the answer is yes. Federal courts are authorized to decide only "cases" and "controversies." U.S. Const. Art. III, § 2. In order to meet this requirement, a plaintiff must present a concrete dispute involving an injury to himself. The law has been well summarized in New Hampshire Right to Life Political Action Committee v. Gardner, 99 F.3d 8, 13 (1st Cir. 1996):

> To clear the Article III hurdle, the party who invokes a federal court's authority must show that (1) he or she personally has suffered some actual or threatened injury as a result of the challenged conduct; (2) the injury can fairly be traced to that conduct; and (3) the injury likely will be redressed by a favorable decision from the court.

The leading Supreme Court case is Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-72, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982). Here, the City's threatened conduct is preventing Ms. Mendez-Thompson from exercising what she claims to be a First Amendment right, running for office, supporting candidates, or contributing to them. Her apprehension that the City might act adversely if she exercised any of these rights seems not unreasonable. The threatened consequence of her exercising the rights is the discipline or discharge of her husband, a city employee, substantially damaging her life and economic condition. If the Court decides favorably on her claim, the city will be prevented from visiting this sanction upon her husband and her.

In addition to this constitutional element, the doctrine of standing also embraces "prudential" concerns. Valley Forge, 454 U.S. at 471. For example, the complaint must "fall within the zone of interests protected by the law invoked." Allen v. Wright, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984). This requirement is clearly met. The political activities in which the plaintiff wishes to engage fall within the very heart of the interests protected by the First Amendment. Next, a plaintiff ordinarily "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal

rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). Here, as we have said, plaintiff has an interest of her own to defend. Not only is it her own political activities that she seeks to protect, but her own personal and economic status as well. Third, the suit must present more than "abstract questions of wide public significance which amount to generalized grievances, pervasively shared and most appropriately addressed in the representative branches." Valley Forge, 454 U.S. at 475 (internal quotations omitted). Again, there is no doubt that Ms. Mendez-Thompson qualifies under this requirement. Her own particular rights and intended activities are at stake, as well as "questions of wide public significance."

We are aware that other courts have reached a different conclusion on similar issues. In Biggs v. Best, Best & Krieger, 189 F.3d 989, 998-99 (9th Cir. 1999), for example, the husband and daughter of a city attorney were involved in local politics. A city councilman said that the city attorney would be fired unless her "family was silenced in Redlands community politics." Id. at 992. The lawyer, her husband, and her daughter brought suit against members of the city council. Summary judgment was granted for defendants on the basis of qualified immunity. On appeal, the Ninth Circuit held that the husband and daughter had no standing to raise claims of their own, but only enough standing to raise, derivatively, the same claims as the city attorney. The Court said:

> Although the loss of Julie Biggs' salary is not insubstantial, we hold that it is only sufficient to confer standing on Jerry and Holly Biggs to assert the same claims brought by Julie Biggs.

Id. at 998. The District Court's holding that the defendants were entitled to qualified immunity as against all plaintiffs was affirmed. The harm that might occur to the city attorney's husband and daughter was described as "indirect." Ibid.

Similarly, in Horstkoetter v. Department of Public Safety, 159 F.3d 1265, 1279 (10th Cir. 1998), a state trooper's wife

wanted to place a yard sign in front of their house. The Court held that the wife had standing only to raise the same claim as her husband, and not to raise any separate claims of her own. The policy, the Court reasoned, applied only to troopers, and not troopers' spouses. No one but troopers could be punished under the policy. There was no possibility of disciplinary action against the spouses themselves. The Court conceded, citing Ben Oehrleins & Sons & Daughter v. Hennepin County, 115 F.3d 1372, 1379 (8th Cir.), cert. denied, 522 U.S. 1036, 139 L. Ed. 2d 621, 118 S. Ct. 643 (1997), that indirect economic injury constitutes injury in fact, but only if the injury is neither speculative nor merely incidental. The Court acknowledged that the plaintiff wife was "without question, indirectly injured by the application of the policy to [her] husband[], because [he was] faced with a loss of income which would have affected the entire family." 159 F.3d at 1279. Still, the Court held, the wife had no claim of her own. If the law was valid as applied to the husband, it would also be valid as applied to discipline him on account of the activities of his wife. This holding is somewhat mitigated, however, by the Court's observation that, if the wife were a joint owner of the property, the husband could not be disciplined, because, in that event, he would have no power to prevent her from placing the sign in the yard, or to remove the sign after it had been placed there. Id. at 1276.

Finally, in English v. Powell, 592 F.2d 727, 730 (4th Cir. 1979), a husband employed by a county was demoted, and the husband was told that if his wife made any further complaints to the employing board, he would be fired. That harm occurred to the wife was not disputed:

> The objective harm results from Shands' demotion to store clerk and attendant decrease in salary; Mrs. Shands, who was a housewife while her husband was personnel manager, had to take a job to supplement the family income.

Still, the Court took the view that these injuries are too indirect and speculative to support Mrs. Shands's standing.

It is a novel theory that a wife possesses such a propriety interest in her husband's position that a decrease in his salary gives her an actionable claim.

Ibid.

We express our disagreement with these cases with respect and with some reluctance, but also with a firm conviction. The injury may be indirect, in that it occurs initially to the husband, through loss of his job. It is nonetheless real and tangible. That the wife has no proprietary interest in the husband's job we are ready to acknowledge, though she may, under state law, have a legal interest in the income that derives from the job. The effect on her life and economic status from the firing of her husband is nevertheless quite substantial, and can be catastrophic. The injury, to be sure, is not certain. We do not know that the City will discipline or fire Mr. Thompson if Ms. Mendez-Thompson engages in any of the listed political activities. But certainty of injury is not necessary, at least in the First Amendment context. She should not be required to undertake a prohibited activity, and risk the consequent economic loss, in order to test the validity of the threatened application of the charter. Possibly the charter can be construed (as the Tenth Circuit suggested in Horstkoetter) not to allow the imposition of sanctions on account of the wife's activity. The husband, for example, would have no legal right to prevent his wife from writing checks on their joint bank account to any payee she saw fit. And certainly the ability of the husband to discharge his legal duty of support would be impaired if he were demoted or discharged.

For all of these reasons, we conclude that the wife has standing. If Ms. Mendez-Thompson's claim were merely duplicative of her husband's, it wouldn't matter whether she had standing or not. The District Court's holdings with respect to the federal constitutional validity of the charter provision would cover her as well as him. Her claim, however, is not merely duplicative. We have held that Mr. Thompson can be disciplined if he violates the charter provision, except for the part about sponsoring, which the

District Court held invalid. Ms. Mendez-Thompson's claim is distinct. It is that her own political rights cannot be chilled by the threat of discipline against her husband. For what he himself does, the City can discipline him, but if the wife's claim is valid as a matter of federal constitutional law, the City cannot discipline the husband for what she does. The District Court did not reach the merits of this claim, and neither do we. It should be addressed on remand.

IV.

It remains to determine the propriety of the District Court's dismissal of the pendent, or supplemental, state claim. This claim is that Section 5.3 of the Ferguson City Charter violates a Missouri statute, Mo. Rev. Stat. § 130.028 (2001). The claim is legally distinct from the federal claims, though it may not require any substantially different proof of facts on either side. After the District Court had disposed of the federal claims on summary judgment, it dismissed the pendent state claim, citing 28 U.S.C. § 1367(c)(3), providing that such state claims may be dismissed without prejudice when all federal claims have been dismissed. As appellants object on appeal, all federal claims were not dismissed in this case. They were disposed of on summary judgment, but the plaintiffs' position was upheld with respect to the sponsoring provision of the charter. However, another portion of the supplemental jurisdiction statute, 28 U.S.C. § 1367(c)(1), provides that a pendent state claim may be dismissed without prejudice if the state-law issue is novel or difficult. We leave the question of how to handle the state claim to the District Court on remand. After the merits of Ms. Mendez-Thompson's federal claim have been determined, the legal predicate will be clearer. The District Court would always be free, of course, to proceed to the merits of the state claim, in its discretion, even if one of the conditions in 28 U.S.C. § 1367(c) for dismissal of the state claim had been satisfied. We express no view on the appropriate outcome of that question.

V.

Accordingly, the District Court's dismissal of that portion of Mr. Thompson's federal claim that is involved in this appeal is affirmed. Its dismissal of Ms. Mendez-Thompson's

federal claim is reversed, and the cause remanded for further proceedings with respect to that claim. Finally, the order dismissing the supplemental state claim without prejudice is vacated, and that issue should be reconsidered by the District Court on remand.

It is so ordered.

CONCURBY:
LOKEN

CONCUR:

LOKEN, Circuit Judge, concurring.

I agree with Part II of the court's opinion, which holds that the City Charter is clearly constitutional insofar as it restricts political activity by City employee Lloyd Thompson. I also agree with what is implicit in Part III of the court's opinion – that the validity under the First Amendment of an ordinance restricting political activities by city employees may well be affected by the extent to which the ordinance restricts, or could be construed as restricting, the political activities of employee spouses.

Lloyd Thompson is the only one who will be sanctioned by the City if his spouse, Alma Mendez-Thompson, engages in political activity that violates the City Charter provision in question. If Alma Mendez-Thompson engaged in political activity and Lloyd Thompson were fired for that reason, he obviously would have standing to argue that the Charter would violate the First Amendment if construed as applying to her political activity. Likewise, prior to suffering any sanction, Lloyd Thompson should have standing to assert a First Amendment claim that the Charter provision is overbroad or vague because of its chilling effect on his spouse's political activities, even if it may validly limit his own political activities.

What is unusual in this case is that plaintiffs, in their zeal to establish Alma Mendez Thompson's standing to assert an independent claim, barely mentioned in the district court, and

argued not at all to this court, that Lloyd Thompson has a First Amendment claim based on the Charter's chilling effect on his wife's freedom to engage in political activities. In my view, plaintiffs' myopia in this regard has led both courts into error. The district court should have considered this aspect of Lloyd Thompson's claim. And this court should remand for that purpose, rather than granting Alma Mendez Thompson standing to assert her own claim. Like the three other circuits that have considered the question, I conclude that in this situation the injury to the spouse derives from the injury to the employee (his actual or potential loss of income), and that the employee is the more appropriate party to litigate a facial challenge to the restraint. See Biggs v. Best, Best & Krieger, 189 F.3d 989, 997-99 (9th Cir. 1999); Horstkoetter v. Dept. of Public Safety, 159 F.3d 1265, 1278-80 (10th Cir. 1998); English v. Powell, 592 F.2d 727, 730 (4th Cir. 1979). Therefore, to eliminate a need to adjudicate multiplicitous claims, and to avoid possible problems of remedy if an ordinance or charter provision were held constitutional as to the employee but invalid as to his spouse, I would hold that prudential concerns limit standing to the employee.

Footnotes

n1 The plaintiffs allege that the challenged provision violates Mo. Rev. Stat. § 130.028 (2001). The District Court dismissed this claim without prejudice after disposing of all federal claims on summary judgment.

Case No. 4:00CV00241 ERW

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS OF St. LOUIS, FRANKLIN, AND JEFFERSON COUNTIES LOCAL 2665, et al., Plaintiffs,

vs.

CITY OF FERGUSON and ALLEN D. GILL, Defendants.

April 17, 2001, Decided

April 17, 2001, Filed

COUNSEL:
For LOCAL 2665 INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, OF ST. LOUIS, FRANKLIN AND JEFFERSON COUNTY, LLOYD THOMPSON, ALMA MENDEZ-THOMPSON, plaintiffs: Jeffrey E. Hartnett, Partner, Julia R. Engelhardt, BARTLEY AND GOFFSTEIN, St. Louis, MO.

For FERGUSON, CITY OF, ALLEN D. GILL, defendants: Priscilla F. Gunn, Brian D. Kennedy, RABBITT AND PITZER, Richard C. Bresnahan, Principal, LANG LAW OFFICE, St. Louis, MO.

JUDGES:
E. RICHARD WEBBER, UNITED STATES DISTRICT JUDGE.

OPINIONBY:
E. RICHARD WEBBER

OPINION:

MEMORANDUM AND ORDER

This matter is before the Court on Defendants' Motion for Summary Judgment [doc. # 24] and Plaintiffs' Motion for Summary Judgment [doc. # 25].

This action is brought under 42 U.S.C. § 1983 by Plaintiffs Lloyd Thompson ("Thompson"), Alma Mendez-Thompson ("Mendez-Thompson") and the International Association of Firefighters of St. Louis, Franklin and Jefferson Counties Local 2665 ("IAF Local 2665") (collectively, the "Plaintiffs"). [n1] Plaintiffs have named as Defendants the City of Ferguson ("City") and the City Manager, Allen Gill ("Gill") (collectively, the "Defendants"). The suit seeks injunctive relief, damages, and a declaratory judgment that § 5.3 of the City Charter violates rights guaranteed under the First and Fourteenth Amendments and is contrary to § 130.028.1, R.S.Mo.

Defendants' Motion for Summary Judgment alleges that (1) the IAF Local 2665 lacks standing to assert any claims in the Complaint because it cannot and has not alleged an injury to itself; (2) the IAF Local 2665 lacks standing to bring the suit inasmuch as the individual members, and not the IAF Local 2665, must bring this suit because the Complaint requests money damages; (3) Mendez-Thompson lacks standing because she has alleged no injury in fact; (4) Thompson lacks standing because he has alleged no injury in fact; and (5) Plaintiffs' claims are not justiciable because none of the Plaintiffs can show actual or threatened enforcement of § 5.3 of the City Charter. With respect to Count I of Plaintiffs' Complaint, the Defendants state that because § 5.3 of the City Charter is not void for vagueness, is a valid restriction on fundamental rights, and because the Plaintiffs do not belong to a suspect class, there is no genuine issue of material fact to be adjudicated in this case concerning Plaintiffs' Equal Protection and Due Process claims. Furthermore, the Defendants argue that Gill is entitled to qualified immunity. With respect to Count 2 of Plaintiffs' Complaint, the Defendants argue that there is no genuine issue of material fact to be adjudicated with regard to Plaintiffs' claim under § 130.028, R.S.Mo. Furthermore, Defendants contend that § 5.3 of the City Charter does not violate Article 1, Sections 8 or 25 of the Missouri Constitution. [n2]

Plaintiffs contend that they are entitled to summary judgment. Specifically, Plaintiffs state that the Missouri Court of Appeals has already ruled that the prohibitions contained in § 5.3 are "void for vagueness," citing Ferguson Police Officers Assoc. v. City of Ferguson, 670 S.W.2d 921, 923 (Mo. App. 1984). Furthermore, Plaintiffs contend that notwithstanding the Missouri Court of Appeals decision, the strictures placed on employees of the City of Ferguson (and their families) violate the First Amendment under the balancing test set forth in Pickering v. Board of Educ., 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). Secondly, the Plaintiffs contend that § 5.3 of the City Charter violates § 130.028.1 of the Missouri Code inasmuch as the Missouri Court of Appeals has already ruled that prohibitions contained in § 5.3 are contrary to Missouri law. Plaintiffs cite Guy v. City of St. Louis, 829 S.W.2d 66 (Mo. App. 1992) to support this argument. Plaintiffs argue that because § 5.3 conflicts with § 130.028.1 R.S.Mo., the Missouri statute supercedes the prohibitions found in § 5.3 and invalidates that provision of the City Charter.

I. STATEMENT OF FACTS. [n3]

The City of Ferguson is a municipality existing under the laws of Missouri and is located within St. Louis County, Missouri. It is a Charter City with a City Manager form of government. Gill as City Manager is responsible for employee discipline and possesses final authority regarding City employee termination decisions. Thompson has been working for the City continuously since 1985. He is currently employed by the City as a firefighter. He has resided in the City for the past ten years, and is a member of IAF. He is married to Mendez-Thompson who has resided with him in the City since 1997.

IAF Local 2665 is the local chapter of the International Association of Firefighters, which is an unincorporated association. IAF Local 2665 encompasses forty fire departments and has over one thousand members within St. Louis, Franklin and Jefferson Counties. Twenty of the twenty-five active members of the City's Fire Department are

members of the IAF Local 2665. [n1] Thompson is the only member of the City Fire Department who resides within the City.

In 1954, the voters of the City approved a City Charter which included a section providing:

Neither the City Manager nor any person holding an administrative office or position under his supervision shall, while holding the office or position, . . . engage, directly or indirectly, in sponsoring any person or candidate for Councilman or in any way electioneer for or against a candidate for Councilman.

In 1998, the City voters approved the current City Charter, which contains § 5.3 which provides:

Neither the City Manager nor any person holding an administrative office or position under the city manager's supervision shall be a candidate for mayor or city council member or engage, directly or indirectly, in sponsoring, electioneering or contributing money or other things of value for any person who is a candidate for mayor or council. All such persons shall retain the right to vote as they choose and to express their opinions on all political subjects. Any person violating the provisions of this section shall be removed in the manner provided in the personnel code.

This section was based on the Model Charter drafted by the National Civic League. It was designed to protect employees from political coercion by candidates.

Since Gill has been City Manager, no City employee has been disciplined for a violation of § 5.3. It is City policy to punish violations of § 5.3 under the City Personnel Code in the same manner in which violations of other City Charter provisions, ordinances, and employee rules and regulations are punished.

Thompson, when he became employed by the City, became interested in City politics. He allegedly has participated in electioneering for candidates, has passed out

ballots for a state representative, has contributed money to approximately six political campaigns, has displayed yard signs and bumper stickers for candidates, has worn hats and pins supporting candidates, and has worked at polls for candidates between ten and twenty times. Thompson further states that if it were not for the prohibitions contained in § 5.3, he would continue to engage in the above activities. Furthermore, Thompson has informed his wife, Mendez-Thompson, that she cannot run for City council because Thompson believed he could not keep his job if she became active. Defendants dispute this fact. Mendez-Thompson alleges that she has not been active in the City because of her concern that her husband's job would be in jeopardy. Mendez-Thompson's attorneys wrote a letter to the City in November 1999 inquiring as to the City's position on whether § 5.3 prohibits Mendez-Thompson from engaging in the prohibited activities listed in § 5.3. The City did not respond to this letter.

John Schneider ("Schneider") is an employee of the City Fire Department, and is the shop steward for IAF Local 2665's City shop. Schneider asked Gill to clarify the City's position regarding § 5.3 in light of the Ferguson ruling. Ferguson Police Officers Association, 670 S.W.2d 921. Gill allegedly responded that § 5.3 was valid and enforceable and prohibited employees from participating in municipal elections for mayor and council members, but the Defendants object to the characterization of Gill's statement. Attached to Plaintiffs' Motion for Summary Judgment is Gill's letter in response to Schneider's question. In it, Gill states that "it is the City's position that this Charter provision is a valid limited restriction on City employees from being involved as specifically stated in elections for the mayor or city council members. Of course, the intent of the restriction contained in the Charter is to protect employees from undue pressure from candidates for these positions." Gill further responded by stating: "The City Attorney has advised the City that, in 1984, the City of Ferguson was sued by a group of police officers alleging that this very portion of the Charter was unconstitutional. The Court of Appeals in that case held that the Charter provision was not unconstitutional and was a

valid limited restriction on city employees participating in municipal elections for mayor and council members." See Plaintiffs' Motion for Summary Judgment, Ex. H.

Schneider has also asked Gill if the City would consider changing the charter to allow City employees to campaign for mayor and for the city council. Gill allegedly responded that the City would not consider this, but the Defendants object that the characterization of Gill's response is incomplete and misleading.

In the Fall of 1998, the City published an employee newsletter which contained the following paragraph:

Political signs became a debated topic after the August 4th ballot. Historically, City Employees have not participated in any manner of election issue, however the City Charter clearly states that employees are only prohibited from participating in the campaigns of elected officials. The City Manager would like the opinion of the City employees before making an administrative decision. Do you enjoy your right to express your political opinions or do you feel more comfortable not having the option?

See Plaintiffs' Motion for Summary Judgment, Ex. I. In response to this query, Schneider circulated a petition which stated that "WE, THE UNDERSIGNED, want and demand the right to express our political opinions, both directly and indirectly, in federal, state and local elections." See Id., Exhibit J. The petition was signed by forty-five (45) persons. Although the Plaintiffs contend that the Petition was given to Julie Szymula, Gill's assistant, Ms. Szymula testified in her deposition that she did not recall receiving the petition. However, Brett Roethemeyer, a firefighter/EMT with the City, testified that he accompanied Schneider to Ms. Szymula's office and saw Schneider hand the petition to Ms. Szymula.

The facts regarding the justification for the implementation and continuation of § 5.3 is not clear. Gill is unaware of any study performed by the City in conjunction with the implementation of § 5.3, and there has been no pressure exerted by mayoral or council candidates on City

employees of which Gill is aware. However, Gill believes that the potential for such pressure exists.

With regard to the specifics of enforcement of § 5.3, there are no written regulations which interpret § 5.3. Gill has testified that the prohibition on indirectly sponsoring a candidate means that a spouse cannot contribute to a candidate from a joint checking account held with a City employee. Gill does not know whether § 5.3 would allow a spouse of a City employee to contribute to a candidate from a solely-held account, and does not know the extent and scope of § 5.3's applicability to spouses. Gill has also testified that the intent of the restrictions in § 5.3 is to avoid undue pressure on employees, who "are very often pressured into contributing, pressured into taking the right stand on issues, pressured into the way they provide services to citizens." See Plaintiffs' Motion for Summary Judgment, Ex. E., Gill Depo., at 42. Mayor Wegert has stated that an indirect violation of § 5.3 would be doing something which gave the impression that a City employee was engaged in prohibited activity. The Mayor has also expressed the sentiment that a City employee would have indirectly supported a candidate if a yard sign was placed in front of the City employee's home, even if placed there by another family member. Furthermore, Mayor Wegert believes that a City employee's spouse should not contribute to candidates for mayor or council since it would be difficult to say from where the money was coming, should not erect yard signs for a candidate for mayor or council, and should not run for mayor or council. Id., Ex. F, Wegert Depo., at 15-22.

Other factual circumstances relevant to the summary judgment motions relate to a bond issue for a proposed community center in the City. The City Charter allows City employees to campaign for issues. The City Council was in favor of this particular bond issue, and the City Council members have authority to grant funding or withhold it. The City held an informational session for employees on the bond issue. Defendants challenge Plaintiffs' allegation that this informational session was nothing more than a meeting to persuade City employees to vote for the bond issue.

II. FERGUSON POLICE OFFICERS ASSOC. V. CITY OF FERGUSON

670 S.W.2d 921 (Mo. APP. 1984).

For purposes of the summary judgment motions pending in this case, it is important to understand the relationship between this case and Missouri Court of Appeals case referenced in the briefs.

The Ferguson Police Officer's Association ("FPOA") sought a declaratory judgment that Article IV, § 29 of the City of Ferguson Charter was unconstitutional inasmuch as it violated the resident members' First Amendment rights, and rights of freedom of speech and association under Article I, § § 8 and 9 of the Missouri Constitution. Ferguson Police Officers Assoc., 670 S.W.2d at 923. Section 29 of the City Charter stated:

ADMINISTRATIVE OFFICERS NOT TO ENGAGE IN POLITICAL ACTIVITY. Neither the City Manager nor any person holding an administrative office or position under his supervision shall, while holding the office or position, be a candidate for City Councilman or engage, directly or indirectly, in sponsoring any person as a candidate for Councilman or in any way electioneer for or against a candidate for Councilman. All such persons shall retain the right to vote as they choose and express their opinions on all political subjects. Any person violating the provision of this section shall be removed in the manner provided in this Charter for the removal of persons holding the office or position.

Id. The court first determined that the FPOA had standing to bring the suit. The court then addressed the merits of the case. The members of the FPOA sought freedom to perform certain acts so long as they were residents of Ferguson: (1) to contribute money or thing of value to city council candidates; (2) to contribute time while off duty and out of uniform to candidates'campaigns; and (3) to speak publicly while off

duty and out of uniform on behalf of a candidate. The FPOA also alleged that § 29 was vague and overbroad. Id. at 926.

The court of appeals determined that the portion of § 29 which prohibited "sponsoring any person as a candidate for councilman" was void for vagueness because the phrase was not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." Id. at 927-28 (quoting Connally v. General Construction Co., 269 U.S. 385, 391, 70 L. Ed. 322, 46 S. Ct. 126 (1926)). However, the court of appeals found that the remainder of § 29 was enforceable in that it was narrowly drawn and the City had valid reasons for restricting the forms of speech of its employee residents. 670 S.W.2d at 928-29. The court of appeals also did not find that § 29 was facially overbroad as to its prohibition against electioneering. 670 S.W.2d at 929-30.

III. SUMMARY JUDGMENT STANDARDS.

The standards applicable to summary judgment motions are well settled. Pursuant to Federal Rule of Civil Procedure 56(c), a court may grant a motion for summary judgment if all of the information before the court shows "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The United States Supreme Court has noted that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" Id. At 327 (quoting Fed. R. Civ. P. 1).

In order to obtain summary judgment, the moving party must demonstrate "an absence of evidence to support the non-moving party's case." Celotex, 477 U.S. at 325. Once the moving party carries this burden, the nonmoving party must "do more than simply show there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). The nonmoving party may not rest on allegations

or denials in the pleadings, but must "come forward with 'specific facts showing that there is a genuine issue for trial.'" Id. at 587 (quoting Fed .R .Civ .P. 56(e)).

In analyzing summary judgment motions, the Court is required to view the facts in a light most favorable to the non-moving party, and must give the non-moving party the benefit of any inferences that can logically be drawn from those facts. Matsushita, 475 U.S. at 587; Buller v. Buechler, 706 F.2d 844, 846 (8th Cir. 1983). Moreover, this Court is required to resolve all conflicts in favor of the non-moving party. Robert Johnson Grain Co. v. Chemical Interchange Co., 541 F.2d 207, 210 (8th Cir. 1976). The trial court may not consider the credibility of the witnesses or the weight of the evidence. White v. Pence, 961 F.2d 776, 779 (8th Cir. 1992).

IV. ANALYSIS.

A. INTRODUCTION.

Under the standards applicable to summary judgment motions, before ruling on the legal issues presented, the Court must find that there are no genuine issues of material fact. [n5] See Celotex Corp., 477 U.S. at 322.

By its very terms, [Rule 56(c)] provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." In Liberty Lobby, the Supreme Court defined "material" facts as those "that might affect the outcome of the suit under the governing law," and explained that "while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." The Court also noted that the material fact must be "genuine," i.e., "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." The Court thus stated that if the evidence is merely colorable or is not significantly probative, summary judgment is appropriate.

Hufsmith v. Weaver, 817 F.2d 455, 460 (8th Cir. 1987) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)) (citing Celotex Corp., 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548). Under applicable standards, the Court finds that there are no genuine issues of material fact in the case that would prohibit the Court from deciding the federal claims as a matter of law. Therefore, the only question for the Court is whether § 5.3 of the City Charter restricts the activities of City resident employees in violation of their Constitutional rights.

B. PLAINTIFFS' AND DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT.

1. INTRODUCTION.

"It is settled law that when the government deals with its employees in its role as employer, it has broader latitude in First Amendment matters than when it deals with its citizens in its role as a sovereign." Int'l Assoc. of Firefighters, Local No. 3808 v. City of Kansas City, 220 F.3d 969, 973 (8th Cir. 2000) (citing Board of County Commissioners, Wabaunsea County v. Umbehr, 518 U.S. 668, 674-76, 135 L. Ed. 2d 843, 116 S. Ct. 2342 (1996)). The central difficulty in this case is determining the limits a public employer may place on its employees' first amendment rights.

2. JUSTICIABILITY.

a. INTRODUCTION.

The Court must first address Defendants' claims that Plaintiffs' claims are not justiciable, and that Plaintiffs lack standing to bring their suit. "At the outset, a claimant must be able to show a facially colorable interest in the proceedings to satisfy Article III standing; otherwise, no constitutional case or controversy exists capable of federal court adjudication." United States v. 1998 BMW "I" Convertible, 235 F.3d 397, 399 (8th Cir. 2000) (citing Tarsney v. O'Keefe, 225 F.3d 929, 934 (8th Cir. 2000)). Standing is a threshold question in every case, and judicial economy requires this Court to consider this issue now prior to trial. Id. (citing Warth v. Seldin, 422 U.S. 490, 498, 45 L. Ed. 2d 343, 95 S. Ct. 2197

(1979)) (also citing Osborn v. United States, 918 F.2d 724, 729 (8th Cir. 1990)).

The Defendants claim that Plaintiffs' claims are not justiciable inasmuch as each Plaintiff lacks standing to proceed. Defendants specifically allege that Mandez-Thompson and Thompson lack standing because they have alleged no injury-in-fact, and that IAF Local 2665 has failed to meet the prerequisites for organization or associational standing.

"Standing . . . focuses directly on the question whether a particular interest or injury is adequate to invoke the protection of a judicial decision." 13A Wright & Miller, Federal Practice & Procedure, § 3631.12 at 50 (1984). "The opinions tell us that standing can rest not only on actual injury, but also on 'threatened' injury. Id., see also Steger v. Franco, Inc., 228 F.3d 889, 892 (2000) ("The plaintiff must show that he or she 'sustained or is immediately in danger of sustaining some direct injury as the result of the challenged ... conduct and [that] the injury or threat of injury [is] both real and immediate . . . .'") (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 102, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983)). Generally speaking, while the threshold of standing is the requirement that a "plaintiff must show a distinct and palpable injury to himself; that this injury [was] caused by the challenged activity; and that this injury is apt to be redressed by a remedy that the court is prepared to give," standing can be found in circumstances where there is a threat that certain important individual values are at stake (e.g., First Amendment rights). 13 Wright & Miller, Federal Practice & Procedure, § 3531.4 at 426-27. A ripe controversy has been found to exist when there have been specific threats of enforcement, "including threats solicited by the plaintiff . . . ." Id.; § 3532.5 at 177-78 (citing Police Dept. of Chicago v. Mosley, 408 U.S. 92, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972) (Court did not reach issue of standing when ruling on validity of picketing ordinance where plaintiff asked police how the ordinance would affect him, and plaintiff changed his activities when informed that he would be arrested.)).

b. THOMPSON.

In this case, Thompson has alleged that he has refrained from acting in ways he believes are protected by the First Amendment based on the City Manager's (Gill) assurance that § 5.3 would be implemented and disciplinary action taken if its provisions were violated. In order for a controversy to be "actual," and ripe, the Eighth Circuit has determined that a party seeking relief must satisfy, to a minimal degree, a two-prong test. The test looks at whether the issue is fit for judicial decision and whether there will be some immediate hardship absent judicial resolution of the controversy. See Nebraska Public Power Dist. v. MidAmerica Energy Co., 234 F.3d 1032, 1038 (8th Cir. 2000).

Judicial resolution of a legal question fit for judicial review yet portending no immediate hardship would constitute little more than a law review article. Conversely, to resolve an issue lacking factual development simply to avoid a threatened harm would be to favor expedition over just resolution. Such is not to say that we may adjudicate only purely legal issues threatening extravagant injuries. Rather, the two prongs must play off each other.

234 F.3d at 1039 (citing State of Missouri ex rel. Missouri Hwy. & Transp. Comm'n v. Cuffley, 112 F.3d 1332, 1337 (8th Cir. 1997)). The Court takes note of the "chilling" effect that compliance with § 5.3 has had on Thompson's, Mendez-Thompson's, and the IAF Local 2665 members' participation in certain political activities, and that the activities which have been chilled are activities typically protected under the First Amendment. See Goodman, 906 F. Supp. at 542 ("Courts have extended the First Amendment's protection to cover political buttons, bumper stickers, and signs. The right to express oneself about issues and candidates at election time is an essential part of our constitutional democracy."). Furthermore, as the Missouri Court of Appeals noted in Ferguson Police Officers Assoc.:

In the instant case the members contend that the provision violated their First Amendment Rights. 'Requirements of ripeness are less strictly construed in the First Amendment

context due to the chilling effect on protected expression which delay might provide.' When the First Amendment is at issue, the injury occurs not only when an employee loses his or her career by challenging the provision and losing, but when countless employees lose their political freedom by obeying an improper regulation until someone successfully challenges it.

Ferguson Police Officers Assoc., 670 S.W.2d at 925. The Eighth Circuit has expressed substantially the same holding. In United Food & Commercial Workers Int'l Union, AFL-CIO, v. IBP, Inc., the Eighth Circuit addressed a challenge that plaintiff did not have standing to sue because there was no actual injury. The Eighth Circuit stated:

Defendants argue there is no actual or threatened injury in this case because no picketers were arrested, prosecuted, or threatened with prosecution during the United Food and Commercial Workers' most recent picketing activities, even though violations of the numbers/distance provision occurred at the IBP site. This argument misapprehends the nature of the injury in fact requirement. Plaintiffs need not expose themselves to actual arrest or prosecution if they legitimately possess more than an "imaginary or speculative" fear of prosecution.

IBP, Inc., 857 F.2d 422, 427. [n6]

In sum, the mere fact that Plaintiff Thompson has not been subject to discipline or termination based on a violation of § 5.3 does not necessarily lead to the conclusion that he lacks standing to proceed with his claim. On the contrary, Gill has made clear that the City will enforce the provisions of § 5.3, and this threatened injury, coupled with Plaintiff's First Amendment claims, is sufficient to confer standing.

c. MENDEZ-THOMPSON.

The question of Mendez-Thompson's standing to challenge the validity of § 5.3 is more difficult. Plaintiffs argue that she has standing, as the wife of a City employee, because

her free speech rights have been hindered by threats to her husband's employment with the City. Defendants allege that she lacks standing because she has not suffered, and will not suffer, any direct harm by virtue of the existence of § 5.3.

Defendants have cited Knoll v. City of Chesterfield, 71 F. Supp.2d 959 (E.D. Mo. 1999) to support their argument that Mendez-Thompson lacks standing. In Knoll, the wife of a city police officer filed a declaratory judgment action alleging that the city's rule which prohibited city employees from participating in or assisting a campaign of a candidate for city officer violated her First Amendment rights. The suit was precipitated by the city's order requiring her husband to remove a sign posted in his yard. The sign had been placed in the yard by his wife. Knoll, 71 F. Supp.2d at 960. Judge Stohr determined that Knoll did not have standing to pursue her claim against the city of Chesterfield. He stated:

Plaintiff's pleadings do not allege the imminent infliction of injury by the city upon Lynette Knoll. Instead, the petition alleges only that the city has directed Robert Knoll to remove the sign and threatened Robert Knoll with disciplinary action. While Robert's choices have ramifications impacting Lynette -- namely the removal of the sign allegedly posted by her, or financial impact on the family as a whole – the city's alleged conduct is not directed at Lynette and threatens no direct injury to her. To expand the concept of standing to encompass familial economic interdependence would allow, for example, an employee's spouse and dependents to bring derivative causes of action in almost any suit based on the employee's termination or suspension without pay.

Id., at 961. The Court is persuaded by this line of reasoning. Mendez-Thompson, because she is not an employee, can suffer no discipline under § 5.3. Her activities may be somewhat restricted by the fact that she is married to Thompson who is subject to the restrictions of § 5.3. However, this does not give her standing to challenge § 5.3. Even if she were to take actions disapproved of by the City, the City could take no legal action against her personally

under § 5.3. Therefore, the Court finds that because Mendez-Thompson can allege no injury in fact, whether actual or threatened, she lacks standing to pursue her claims against the City. For the foregoing reasons, Mendez-Thompson's claims against the Defendants are dismissed for lack of standing.

d. IAF LOCAL 2665.

The final justiciability issue concerns whether IAF Local 2665 has organizational or associational standing to pursue its claims on behalf of its members. The Union has not alleged any harm suffered directly by it. Rather, it alleges harm suffered by its individual members. As such, the Union must meet the criteria for organizational or associational standing.

A voluntary association may have organizational or associational standing if it seeks to vindicate the rights of its members or to vindicate its own rights. Warth v. Seldin, 422 U.S. 490, 511, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). Under Hunt v. Washington State Apple Advertising Comm'n, an organization may bring suit on behalf of its members if three criteria are met: "Its members must have standing to sue, the interests it seeks to protect must be germane to its own purpose, and neither the claim asserted nor the relief requested may demand the participation of the individual members." National Federation of Blind of Missouri v. Cross, 184 F.3d 973, 981 (8th Cir. 1999) (quoting Hunt, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977)). Clearly, the claim asserted and the relief requested by IAF Local 2665 will demand the participation of individual members. That does not necessarily end the inquiry.

The Supreme Court discussed the relationship between the requirements of Hunt and Article III's requirements of injury in fact, causal connection to the defendant's conduct and redressability. See United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 554-55, 134 L. Ed. 2d 758, 116 S. Ct. 1529 (1996). Brown Group, Inc. originated in the filing of a suit by a union on behalf of its employee-members against an employer over the employers failure to comply with the Workers Adjustment

and Restraining Notification Act ("WARN") which mandates the giving of sixty day's notice before a plant is to be closed or union layoffs occur. The Eighth Circuit Court of Appeals denied the union standing because damages were sought. In analyzing the analysis of the Circuit decision, the Supreme Court observed, "These and later precedents have been understood to preclude associational standing when an organization seeks damages on behalf of its members . . . . The Court of Appeals here apparently agreed with that suggestion [lower federal courts have consistently rejected association assertions of standing to seek monetary relief], and so dismissed for lack of union standing despite the WARN Act's provisions permitting the union to sue. We therefore take up the question whether the third prong of the associational standing inquiry is of constitutional character." Id. at 554. The Court then referenced the Hunt requirements:

There are two ways in which Hunt addresses the Article III requirements of injury in fact, causal connection to the defendant's conduct, and redressability. First and most obviously, it guarantees the satisfaction of these elements by requiring an organization suing as representative to include at least one member with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association. As Hunt's most direct address to Article III standing, this first prong can only be seen as itself an Article III necessity for an association's representative suit. Hunt's second prong is, at the least, complementary to the first, for its demand that an association plaintiff be organized for a purpose germane to the subject of its member's claim raises an assurance that the association's litigators will themselves have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant's natural adversary. But once an association has satisfied Hunt's first and second prongs assuring adversarial vigor in pursuing a claim for which member Article III standing exists, it is difficult to see a constitutional necessity for anything more. . . . the third prong of the associational standing test is best seen as focusing on these matters of administrative convenience and

efficiency, not on elements of a case or controversy within the meaning of the Constitution.

Brown Group, Inc., 517 U.S. at 556-57 (emphasis added). The Supreme Court then determined that because Congress had explicitly authorized the union to sue for its members' damages, "and because the only impediment to that suit is a general limitation, judicially fashioned and prudentially imposed, there is no question that Congress may abrogate the impediment." Id. at 558. Therefore, it is at least the case that where Congress abrogates the impediment, an association may sue on behalf of its members, in its representative capacity, for damages.

With respect to the first criterium, at least one member who has standing to sue has entered the case. The Court has already determined that Thompson has standing to sue in this matter. However, the question remains whether there are other members of IAF Local 2665 who would have standing to sue. The Court finds that other members of the IAF Local 2665 would have standing to sue in their individual capacity. The scope of § 5.3 is such that even non-residents of the City are impacted by the provision because of their employment with the City. Even though a non-resident employee may not be able to vote for a member of the council or for a candidate for mayor, those non-resident employees may have an interest in campaigning for a particular person whom they believe would better represent their interests as an employee of the City and who may improve their working conditions. At least one member of the union, John Schneider (an employee of the City's fire department and a member of IAF Local 2665) has indicated that other members of the department are dissatisfied because of their inability to campaign for candidates in the City. Plaintiffs' Motion for Summary Judgment, Ex. B, Schneider Depo., at 23. John Schneider has indicated a desire, through the signing of the petition he circulated (attached as Ex. J to Plaintiffs' Motion for Summary Judgment), to express his views on City elections. Brett Roethemeyer, another City fire department employee, has expressed a similar desire through the signing of the petition. See Id., Ex. J. Based on the fact that there are

members of the union who would have standing to sue in individual capacities, the union has met the first criterium for organizational or associational standing.

With regard to the second criterium, the IAF Local 2665, as in Ferguson Police Officers Assoc., seeks to "promote the welfare of its members and improve their working conditions. . . . By giving their members an opportunity to work for candidates it could help promote the candidacy of persons who could improve their members' working conditions. . . . Restrictions on their political activities are a condition of employment and removing those restrictions if found unconstitutional may improve the employees' working conditions and welfare." Ferguson Police Officers Assoc., 670 S.W.2d at 925. The Court agrees with the analysis of the Missouri Court of Appeals on the second prong, and finds that the IAF Local 2665, has met the second criterium for establishing organizational standing.

IAF Local 2665 cannot satisfy the third requirement. The claim asserted and the relief requested (damages) requires the participation of individual members in the lawsuit. Unlike Brown Group, Inc., there is no explicit authorization for the union to sue for its members' damages and no abrogation of impediments announced by Congress which would allow the suit to go forward under the facts and circumstances of this case. As Brown Group, Inc. noted, the third criterium is not of constitutional moment, and therefore whether the third criterium is met or not rests on considerations of administrative convenience and efficiency. Brown Group, Inc., 517 U.S. 557, 134 L. Ed. 2d 758, 116 S. Ct. 1529. However, as the Court in Brown Group, Inc. pointed out, the fact that this third factor is not of constitutional moment does not "rob it of its value."

It may well promote adversarial intensity. It may guard against the hazard of litigating a case to the damages stage only to find the plaintiff lacking detailed records or the evidence necessary to show the harm with sufficient specificity. And it may hedge against any risk that the damages recovered by the association will fail to find their

way into the pockets of the members on whose behalf injury is claimed.

Id., 517 U.S. at 556-57. In addition to the reasons above cited, the interests of administrative convenience and efficiency are not furthered by allowing IAF Local 2665 to proceed with a claim for damages against the City. The union has not provided the Court with other, non-legislative, rationale which would warrant allowing it to proceed with a claim for damages against the City on behalf of the union members. In short, the Court finds that the claim for damages by the union against the City shall not proceed. This conclusion is not construed as a bar to union claims for injunctive or some other form of prospective relief.

2. COUNT I.

a. INTRODUCTION.

Defendants maintain three arguments in their motion for summary judgment with respect to Plaintiffs' claims in Count I of Plaintiffs' Complaint. First, Defendants argue that Plaintiffs cannot prove that § 5.3 of the City Charter is void for vagueness. Second, Defendants argue that to the extent that § 5.3 prohibits or limits Plaintiffs from engaging in political activities protected under the First Amendment, "§ 5.3 is valid as a limited restriction on the political activities of City employees in furtherance of the City's compelling interest in preserving the integrity and efficiency of the City administration and public confidence that essential City services will be provided impartially." Defendants' Motion for Summary Judgment at 4. Third, Defendants argue that § 5.3 is not substantially overbroad, and is therefore not facially invalid under the First and Fourteenth Amendments.

In their motion for summary judgment, Plaintiffs argue first that the Court has jurisdiction over all claims. Second, Plaintiffs argue that they have standing to bring the suit, and that their claims present a justiciable controversy. Third, Plaintiffs argue that the Missouri Court of Appeals in Ferguson Police Officers Assoc. already determined that the provisions of § 5.3 are void for vagueness. Fourth, Plaintiffs argue that § 5.3 violates the First Amendment of the United

States Constitution inasmuch as it limits the political speech of the Plaintiffs and, under Pickering, the Plaintiffs' rights to engage in political speech outweigh any interest the City may have in restricting that speech.

b. VOID FOR VAGUENESS.

Defendants argue that the subsequent addition of an express prohibition on financial contributions cured the constitutional infirmity identified by the Missouri Court of Appeals in Ferguson Police Officers Assoc. See Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment, at 8. Furthermore, the Defendants argue Thompson's intended activities are encompassed within the prohibition on electioneering, and conclude from this that § 5.3 is not void for vagueness. Id. at 8-9. As discussed previously, the Missouri Court of Appeals found that the provision of § 29 of the previous City Charter which prohibited "sponsoring any person as a candidate for councilman" was void for vagueness. Ferguson Police Officers Assoc., 670 S.W.2d at 927. The court stated that it could not determine what was meant to be included in "'sponsoring' – signing a petition to place an individual on the ballot, initiating such a petition and gathering signatures, contributing a small or large sum of money to the campaign, buying advertisement time for a candidate, etc." Id. at 927-28. The court concluded that this phrase was not "'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.'" Id. at 928 (quoting Conally v. General Constr. Co., 269 U.S. 385, 391, 70 L. Ed. 322, 46 S. Ct. 126 (1926)).

This Court is persuaded by the sound reasoning of the Missouri Court of Appeals. Conally holds that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of the process of law." Conally, 269 U.S. at 391. The Conally court, although dealing with a penal statute, elaborated on some of the characteristics of a statute which does not want for certainty. Those statutes:

employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, or a well-settled common-law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, or, as broadly stated by Mr. Chief Justice White . . . , 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.'

Conally, 269 U.S. at 391-92 (quoting United States v. Cohen Grocery Co., 255 U.S. 81, 92, 65 L. Ed. 516, 41 S. Ct. 298 (1921)). Cases involving statutes which were not upheld have done so because the language "fixed no ascertainable standard of guilt, in that they forbade no specific or definite act." 269 U.S. at 392.

A void-for-vagueness challenge is a facial challenge. Stephenson v. Davenport Community Sch. Dist., 110 F.3d 1303, 1308 (8th Cir. 1997). The first task the Court must perform when analyzing a facial challenge to § 5.3 is to "determine whether the enactment reaches a substantial amount of constitutionally protected conduct." Id. (quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982)). The City Charter provision restricts political speech which has long been protected under the First Amendment. "A stringent vagueness test applies to a law that interferes with the right of free speech." Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 689-90 (8th Cir. 1992).

In "determining whether an ordinance is unconstitutionally vague, 'courts traditionally have relied on the common usage of statutory language, judicial explanations of its meaning, and previous applications of the statute to the same or similar conduct.'" Stephenson, 110 F.3d at 1309 (quoting D.C. & M.S. v. City of St. Louis, MO, 795 F.2d 652, 654 (8th Cir. 1986)) (also quoting Postcript Enterprises, Inc. v. Whaley, 658 F.2d 1249, 1255 (8th Cir. 1981)). The Court acknowledges the prior adjudication of this charter provision's predecessor by the Missouri Court of Appeals, finding the phrase "in sponsoring any person as a candidate

for councilman" void for vagueness. Ferguson Police Officer's Ass'n, 670 S.W.2d at 927. The charter provision, although changed to include a prohibition against direct or indirect contributions of money or other things of value, still includes a prohibition on sponsorship. Gill's deposition indicates that there are several types of protected activity that may or may not be prohibited under the sponsorship provision of § 5.3. See Plaintiffs' Motion for Summary Judgment, Ex. E, Gill Depo., at 19. Gill states that sponsoring, in his opinion "would mean lending your name, your endorsement, that type of thing." Id. Mayor Wegert testified in his deposition that he "would interpret sponsoring to be speaking on behalf of, endorsing, taking a public position on a particular candidate for mayor or council." Id., Ex. F, Wegert Depo., at 20. For purposes of the Defendants' summary judgment motion, this means that two high ranking City officials have interpreted the sponsorship prohibition differently.

The Court finds that summary judgment is not appropriate for Defendants on Count I of Plaintiffs' Complaint with respect to the term "sponsoring" in the phrase found in § 5.3 which prohibits City employees from "directly or indirectly, in sponsoring, electioneering or contributing money or other things of value for any person who is a candidate for mayor or council . . . ." Relying "'on the common usage of statutory language, judicial explanations of its meaning, and previous applications of the statute to the same or similar conduct,'" Stephenson, 110 F.3d at 1309, the Court is persuaded that the term "sponsorship," undefined in § 5.3 as it was in § 29 of the old City Charter, is not so definitive as to entitle Defendants to summary judgment on the issue of whether that term will constitutionally withstand the void for vagueness challenge of § 5.3. In this case, given the fact that two high ranking City officials have interpreted the term in a sufficiently different manner as to raise a legal question regarding what conduct is included within the meaning of the term, Defendants have not shown that they are entitled to judgment as a matter of law on Plaintiffs' claim in Count I that § 5.3 is void-for-vagueness.

Under Grayned v. City of Rockford, 408 U.S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972), in order to survive a vagueness

challenge, "a statute must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,' and 'provide explicit standards for those who apply [the statute].'" Video Software Dealers Assoc., 968 F.2d at 689 (quoting Grayned, 408 U.S. at 108). In this case, where two different persons (including the City Manager who is charged with enforcement of the statute) in positions of authority with the City have spoken differently on the nature of the activities prohibited by the term "sponsorship," there is no basis for granting summary judgment to Defendants on Plaintiffs' facial challenge to the constitutionality of § 5.3. There are no standards included in the provision by which Gill is to enforce the provision, and no official interpretation has been made concerning the scope of the provision. Therefore, Defendants are not entitled to summary judgment on the portion of Plaintiffs' Count I challenging the term "sponsorship."

Consequently, the Plaintiffs are entitled to summary judgment on their claim that the inclusion of the term "sponsorship" in § 5.3 violates the First and Fourteenth Amendments inasmuch as the term "sponsorship" is not defined in the statute, there are no explicit standards for applying the statute to activities deemed to be "sponsorship," and persons of ordinary intelligence are thus left to guess at the meaning of the term "sponsorship." As the Missouri Court of Appeals stated seventeen years ago:

The danger of arbitrary and discriminatory enforcement is present in § 29. The language of the provision is not clear, and the city manager may interpret § 29 as he or she sees fit when a particular situation arises, without the guidance of written regulations. It is up to him or her to determine whether a police officer may contribute to a council candidate. The city manager serves at the pleasure of the city council, and may be replaced at any time. An employee cannot be sure who will be making a decision regarding whether "sponsoring" or "electioneering" include campaign contributions.

Ferguson Police Officers Assoc., 670 S.W.2d at 927. It is true that § 5.3 now explicitly makes contributions to a campaign illegal by prohibiting employees from "contributing money or other things of value for any person who is a candidate for mayor or council." It is also true that the Missouri Court of Appeals was concerned about the specific issue of campaign contributions in the Ferguson Police Officers Assoc. case. Id. However, the fact that the prohibition against sponsorship of a candidate affects the First Amendment rights of the resident employees of the City means that the Court is to apply a strict standard in determining whether a provision in § 5.3 is void for vagueness. See Video Software Dealers Ass'n, 968 F.2d at 689-90 ("A stringent vagueness test applies to a law that interferes with the right of free speech."). Application of a stringent vagueness standard leads the Court to conclude that § 5.3 is void for vagueness to the extent that it prohibits "sponsorship" of political candidates in local elections for City Council and the Mayor. This conclusion is further supported by the fact that the City's Mayor and City Manager have defined sponsorship to include different types of activities. While the commonality in the way the term was defined by them was that sponsorship included the endorsement of a candidate, the broad ranging implications on the First Amendment rights of the resident employees of the City are such that the sponsorship prohibition in § 5.3 of the City Charter must be declared unconstitutional. [n7]

However, the remainder of the statute is not void for vagueness. In analyzing a void for vagueness claim, the Court is to rely on the "'common usage of statutory language, judicial explanations of its meaning, and previous applications of the statute to the same or similar conduct.'" Stephenson, 110 F.3d at 1309 (quoting D.C. & M.S. v. City of St. Louis, MO, 795 F.2d 652, 654 (8th Cir. 1986)) (also quoting Postcript Enterprises, Inc. v. Whaley, 658 F.2d 1249, 1255 (8th Cir. 1981)). Under this standard, the Missouri Court of Appeals has already construed the term "electioneering" to mean "taking an active part in an election campaign." Ferguson Police Officers Assoc., 670 S.W.2d at 928. Electioneering can be construed to include the named activities in Plaintiffs' brief in which the Plaintiffs wish to

participate. Furthermore, there is no indication that a person of reasonable intelligence would have to guess at the meaning of "electioneering," particularly in light of the Missouri Court of Appeals' definition. Therefore, the Court finds that the only portion of the statute which is voidable under the vagueness doctrine is that part of the statute that prohibits "sponsorship." [n8]

c. SECTION 5.3 AND PICKERING. [n9]

Plaintiffs argue that § 5.3 is unconstitutional under the First Amendment because, under the analysis used in cases where government employees allege that conditions of employment violate the First Amendment, the Plaintiffs' rights to political speech clearly outweigh any interest the City may have in restricting the employees' speech. See Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 9-10. [n10]

Plaintiffs face a substantial burden in attempting to argue that § 5.3 unduly and unconstitutionally infringes on their First Amendment rights by restricting their political activities and speech.

The courts which have considered this argument have upheld the validity of these statutes or ordinances where the enactments served the state or local governmental interests in maintaining discipline and providing for the effectiveness of its employees. Moreover, a number of courts have upheld the validity of this type of statute against the contention that the restrictions imposed violated the guaranteed freedom of speech on the ground that the restrictions constituted a valid condition of employment which was accepted by the officer or employee when he accepted employment in the public sector.

Francis M. Dougherty, Annotation, Validity, Construction, and Effect of State Statutes Restricting Political Activities of Public Officers or Employees, 51 A.L.R. 4th 702 (1987). However, "it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.

Our task, as . . . defined . . . in Pickering, is to seek 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" Connick v. Meyers, 461 U.S. 138, 142, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1987). However, before engaging in the Pickering balancing test, the Court must first inquire into whether the speech restricted under § 5.3 of the City Charter involves matters of public concern. Padilla v. South Harrison R-II School Dist., 181 F.3d 992, 996 (8th Cir. 1998) ("We use a two-step process to determine whether a public employee's speech is entitled to constitutional protection. Initially, we must find that an employee's speech can be 'fairly characterized as constituting speech on a matter of public concern.'").

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Connick, 461 U.S. at 147-48. In this case, the speech restricted by § 5.3 is political speech, and therefore involves matters of public concern.

Having determined that the speech restricted under § 5.3 involves matters of public concern, the Court must engage in the Pickering balance, which "requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." 461 U.S. at 150. Defendants rightly point out that this case does not involve a post hoc analysis of an employee's speech and an employer's subsequent retaliation for that speech. Therefore, retaliation cases are not applicable. Instead, as in United States v. National Treasury Employees Union, 513 U.S. 454, 466-67, 130 L. Ed. 2d 964, 115 S. Ct. 1003 (1995), this case involves the application of Pickering to a prohibition in the City's charter which restricts the speech of all resident employees of the City. [n11] Therefore, the Court must apply the Pickering balance in order to determine whether the City Charter provision is valid and enforceable as a preliminary restraint on the City employees' political speech.

However, this raises a significant issue that must be addressed before applying the Pickering balance test. That is, because the Court has already found that the term "sponsorship" is so ambiguous and lacking concrete standards which would allow resident employees of the City to have notice of the actions which are prohibited, the Court must determine if it is appropriate to sever out the offending portion of § 5.3 and analyze the statute without the term "sponsorship."

In Ferguson Police Officers Assoc., the Missouri Court of Appeals determined that while the sponsorship provision of § 29 was void for vagueness, the purpose of the statute was not compromised if the sponsorship provision in the section of the charter was severed out and the good portion allowed to remain. See Ferguson Police Officers Assoc., 670 S.W.2d at 928. Furthermore, the court went on to find that the prohibition against electioneering was valid and enforceable as against the employee residents of the City. Id. at 928-30. The Court is again persuaded by the reasoning of the Missouri Court of Appeals. "Once the unconstitutional portions of a statute are excised, the remainder can be upheld under Missouri law if it 'is in all respects complete and susceptible of constitutional enforcement' and the court concludes that it would have been adopted even if it had been known that 'the excluded portion was invalid.'" Shrink Missouri Government PAC v. Maupin, 71 F.3d 1422, 1427 (8th Cir. 1995) (quoting Millsap v. Quinn, 785 S.W.2d 82, 85 (Mo. 1990) (en banc)).

"[A] court should refrain from invalidating more of the statute than is necessary . . . . 'Whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.'" The standard for determining the severability of an unconstitutional provision is well established: "'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'"

Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684, 94 L. Ed. 2d 661, 107 S. Ct. 1476 (1987) (quoting Regan v. Time, Inc., 468 U.S. 641, 652, 82 L. Ed. 2d 487, 104 S. Ct. 3262 (1984) (plurality opinion) (also quoting El Paso & Northeastern R. Co. v. Gutierrez, 215 U.S. 87, 96, 54 L. Ed. 106, 30 S. Ct. 21 (1909); Buckley v. Valeo, 424 U.S. 1, 108, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976); Champlin Refining Co. v. Corporation Comm'n of Oklahoma, 286 U.S. 210, 234, 76 L. Ed. 1062, 52 S. Ct. 559 (1932)). "The . . . relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent of Congress." 480 U.S. at 685. Here, if the term "sponsorship" is excised from § 5.3, the provision will read as follows:

Neither the City Manager nor any person holding an administrative office or position under the city manager's supervision shall be a candidate for mayor or city council member or engage, directly or indirectly, in electioneering or contributing money or other things of value for any person who is a candidate for mayor or council. All such persons shall retain the right to vote as they choose and to express their opinions on all political subjects. Any person violating the provisions of this section shall be removed in the manner provided in the personnel code.

Under this construction, the statute will still act to prevent the active participation of resident employees of the City in City elections as well as the ability of resident employees to contribute money or other things of value for any person who is a candidate for mayor or council. Because Defendants have maintained that § 5.3 is designed to limit only political actions, and not encompass other forms of political speech, this indicates that the purpose of the ordinance is to prohibit the types of actions encompassed by the term "electioneering" and by the restriction on campaign contributions. While the purpose of § 5.3 may have also intended to draw in to its scope the public endorsement of a campaign (which is indicated by the depositions of Gill and Wegert), the fact that § 5.3 states that all persons affected by the statute "retain the right to vote as they choose and to

express their opinions on all political subjects" indicates that the real intent of the provision was to prevent political actions. Therefore, the Court finds that § 5.3 can still stand without the term "sponsorship."

The Pickering balance test requires the Court to seek "'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" Connick, 461 U.S. at 142. In this case, the specific restraints placed on the Plaintiffs involve their ability to participate in electioneering activities and contribute money or anything of value to the campaign of a person running for City mayor or council. [n12] The restriction, as the one in National Treasury Employees Union, does not restrict speech based on content or viewpoint; even so, it is still a significant restraint on the City employees' expressive activity. Therefore, the Government faces a substantial burden in showing that the interests of the City employees in their expressive activity are outweighed by the expressive activity's "'necessary impact on the actual operation' of the Government." National Treasury Employees Union, 513 U.S. at 468 (quoting Pickering, 391 U.S. at 571).

The City's asserted compelling interests in restricting City employees' expressive activities are preserving the integrity and efficiency of the City administration, not eroding public confidence that essential City services are provided impartially, and in the fairness of the election process. See Memorandum in Support of Defendants' Motion for Summary Judgment at 9. The City also argues that absent § 5.3, City employees, not covered by any civil service provision, could be pressured into supporting political candidates through fear of job loss. Id., see also Plaintiffs' Motion for Summary Judgment, Ex. E, Gill Affid., at 30-44. Plaintiffs argue that these alleged compelling interests are merely conjecture, and that Defendants have provided no evidence to support these interests.

"When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms,

it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 664, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994). "As Justice Brandeis reminded us, a 'reasonable' burden on expression requires a justification far stronger than mere speculation about serious harms. 'Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. . . . To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced." National Treasury Employees Union, 513 U.S. at 475 (quoting Whitney v. California, 274 U.S. 357, 276, 71 L. Ed. 1095, 47 S. Ct. 641 (1927) (Brandeis, J., concurring)).

The Court finds that the City has failed to justify the restrictions on free speech found in § 5.3 on the grounds that City employees may be subject to political pressure. The potential pressure that City employees could face absent § 5.3 is not supported by any substantial evidence which would suggest that this proffered reason is anything other than mere conjecture or fear of serious injury. There has been no evidence, other than the statements of City officials, that § 5.3's restrictions will in fact alleviate the potential for this sort of pressure on City employees. [n13] Therefore, absent sufficient evidence to support this proffered compelling interest, the Court cannot find that the restrictions on free speech found in § 5.3 are justified by the potential for political pressure on City employees.

However, the City can justify the restrictions found in § 5.3 on the grounds that such restrictions are necessary to protect against the erosion of public confidence in the impartiality of the provision of Government services, in preserving the fairness of City elections, and in preserving the efficiency of the operations of the City. "Operational efficiency is undoubtably a vital governmental interest . . . ." National Treasury Employees Union, 513 U.S. at 473. The Supreme Court has found that where an employees' duties "require establishment and maintenance of a relationship of

trust and confidence . . . the state has a valid interest in prohibiting activities which would adversely effect that relationship." Connealy v. Walsh, 412 F. Supp. 146, 155 (W.D. Mo. 1976). The Supreme Court has "sustained comprehensive and substantial restrictions upon activities of both federal and state employees lying at the core of the First Amendment." Reeder v. Kansas City Board of Police Commissioners, 733 F.2d 543, 548 (8th Cir. 1984) (upholding prohibition on government employees which restricted their ability to make any political contributions) (quoting Kelley v. Johnson, 425 U.S. 238, 245, 47 L. Ed. 2d 708, 96 S. Ct. 1440 (1976)). In this case, the restrictions are narrowly applied only to local elections for mayor and City council. The Defendants have demonstrated a reasonable belief that if the prohibitions of § 5.3 were not in place, there is a strong potential that governmental efficiency would be undermined and that confidence in the impartiality of the City would be eroded. Furthermore, the cases of Mitchell, supra, Broadrick, supra, and National Association of Letter Carriers, supra, upheld such restrictions in the context of compelling government interests of this kind. Therefore, because the interest of the City outweighs the asserted interests of the Plaintiffs in this case, the Court finds that § 5.3 should be upheld to the extent that it prohibits electioneering and contributions, both direct and indirect. [n14]

This conclusion is further warranted by an examination of some of the cases presented to the Court by the parties. The Plaintiffs rely heavily on Goodman v. City of Kansas City, 906 F. Supp. 537 (W.D. Mo. 1995), where the plaintiffs challenged an administrative regulation which prohibited city employees from publicly supporting candidates for city council, mayor or persons seeking retention as a judge of the Kansas City municipal division of the circuit court. In Goodman, the court determined that because the city failed to present evidence to support any "real and not merely conjectural" harms, the Pickering balance was tipped in favor of the Plaintiffs and the city was enjoined from enforcing the regulation. However, as Judge Limbaugh has noted in International Brotherhood of Electrical Workers, AFL-CIO, Local # 1 v. St. Louis County, 117 F. Supp.2d 922, 934 (E.D. Mo. 2000), this decision

conflicts with Supreme Court decisions in Mitchell, National Association of Letter Carriers, and Broadrick v. Oklahoma. If the Court were to follow the Goodman decision, it would be contrary to the precedent which has established the ability of the state to condition employment on the agreement to not engage in activities which are otherwise constitutionally protected, including the restriction of certain First Amendment rights. Therefore, this Court agrees with Judge Limbaugh, and is unable to follow the decision in Goodman as it conflicts with the multitude of precedent in this area. The Court looks to the decisions in Reeder, supra, Kelley, supra, Broadrick, supra, Mitchell, supra, and National Association of Letter Carriers for support of its decision to find that § 5.3, absent the prohibition on sponsorship, does not violate the First Amendment rights of the Plaintiffs.

V. QUALIFIED IMMUNITY. [n13]

A motion for summary judgment on qualified immunity grounds is only precluded when the plaintiff has "(1) asserted a violation of a constitutional right; (2) demonstrated that the alleged right is clearly established; and (3) raised a genuine issue of fact as to whether the official would have known that his alleged conduct would have violated the plaintiffs' clearly established right." Stated another way, qualified immunity shields a defendant from suit if he or she could have reasonably believed his or her conduct to be lawful "in light of clearly established law and the information [that the defendant] possessed." "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" Although qualified immunity is "'an immunity from suit rather than a mere defense to liability,'" and therefore its availability "ordinarily should be decided by the court long before trial," the nonmoving party is given the benefit of all relevant inferences at the summary judgment stage, and if a "genuine dispute exists concerning predicate facts material to the qualified immunity issue, the defendant is not entitled to summary judgment on that ground."

Smithson v. Aldrich, 235 F.3d 1058, 1061 (8th Cir. 2001) (quoting Goff v. Bise, 173 F.3d 1068, 1072 (8th Cir. 1999) (also quoting Habiger v. City of Fargo, 80 F.3d 289, 295 (8th Cir.), cert. denied, 519 U.S. 1011, 136 L. Ed. 2d 407, 117 S. Ct. 518 (1996); Anderson v. Creighton, 483 U.S. 635, 641, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); Hunter v. Bryant, 502 U.S. 224, 229, 116 L. Ed. 2d 589, 112 S. Ct. 534, (1991) (per curiam), quoting Malley v. Briggs, 475 U.S. 335, 343, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986); Pace v. City of Des Moines, 201 F.3d 1050, 1056 (8th Cir. 2000)). Under the objective standard which the Court is to apply, the Court finds that Gill's actions were reasonable in light of the information available to him. While it is true that the term "sponsorship" was held to be problematic in Ferguson Police Officer Assoc., the fact that the City attempted to correct the problem addressed by the Missouri Court of Appeals by inserting language dealing with campaign contributions leads the Court to conclude that a reasonable person in Gill's position would have determined that § 5.3 did not violate Plaintiffs' clearly established constitutional rights. See Malley v. Briggs, 475 U.S. 335, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986) (the purpose of the qualified immunity doctrine is to provide ample room for mistaken judgments and to protect "all but the plainly incompetent or those who knowingly violate the law."). Accordingly, Gill is entitled to summary judgment on Plaintiffs' claims for money damages.

VI. PLAINTIFFS' REMAINING FEDERAL CLAIMS.

Defendants have argued that they are entitled summary judgment on Plaintiffs' remaining federal claims. However, Plaintiffs have not argued any additional federal claims except their claims under the First Amendment in their motion for summary judgment. In their Complaint, Plaintiffs did allege that § 5.3 violated the Equal Protection Clause. However, Plaintiffs offered no evidence to support this claim. There has been no demonstration that other similarly situated persons were treated differently from the Plaintiffs. The Court finds that because there is no genuine issue of material fact regarding Plaintiffs' Equal Protection Claim, and because there is no evidence to support this claim in law, the

Defendants are entitled to summary judgment on Plaintiffs' Equal Protection Claim.

VII. PLAINTIFFS' STATE LAW CLAIMS.

Under 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction over a claim over which it would otherwise not have jurisdiction if "the district court has dismissed all claims over which it has original jurisdiction . . . ." In this case, the only remaining claims are state law claims brought under § 130.028.1, R.S.Mo. and under Article 1, Sections 8 and 25, of the Missouri Constitution. Because the Court will grant summary judgment on all federal claims, the Court finds it appropriate to dismiss Plaintiffs' state law claims without prejudice.

Accordingly,

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment [doc. # 24] is GRANTED, in part and DENIED, in part.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment [doc. # 25] is GRANTED, in part and DENIED, in part. The City shall be permanently enjoined from enforcing § 5.3 to the extent that it prohibits "sponsorship" of candidates for mayor or City council.

Dated this 17th Day of April, 2001.

E. RICHARD WEBBER

UNITED STATES DISTRICT JUDGE

JUDGMENT

In accordance with the Memorandum and Order of this Court filed on this date and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that Plaintiffs shall have judgment against the Defendants on their First Amendment claim alleging that § 5.3 is void for vagueness to the extent that it includes the term "sponsorship." The Defendants shall be permanently enjoined from enforcing § 5.3 to the extent that it prohibits City

employees from "sponsoring," directly or indirectly, candidates for City mayor or council.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Defendants shall have judgment against Plaintiffs on all other federal claims made by Plaintiffs against Defendants in their Complaint.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiffs' Missouri state law claims shall be dismissed without prejudice.

Dated this 17th Day of April, 2001.

E. RICHARD WEBBER

UNITED STATES DISTRICT JUDGE

Footnotes

n1 IAF brings this action on behalf of Thompson and other similarly situated firefighters and employees of the City of Ferguson.

n2 The Plaintiffs do not discuss any claims under the Missouri Constitution in their briefs.

n3 The Court is required to view the facts in a light most favorable to the non-movant. Here, with opposing summary judgment motions, that task is complicated. However, a careful examination of the facts leads to the Court to conclude that while the parties are in disagreement about certain facts, there are no genuine issues of material fact that would preclude a determination of the case as a matter of law. Therefore, the Court sets out the facts which it believes are material to both motions for summary judgment.

n4 There is a dispute between the parties as to whether the Fire Department is a "Union shop."

n5 This process is complicated by the fact that both parties have filed motions for summary judgment in which they have both alleged that there are no genuine issues of material fact that remain with respect to the allegations made

in their respective briefs in support of their motions for summary judgment. Generally speaking, a court is to presume and view the facts in a light most favorable to the non-moving party and to allow the non-moving party the benefit of all reasonable inferences to be drawn from the evidence. Goodman v. City of Kansas City, Missouri, 906 F. Supp. 537, 540 (W.D. Mo. 1995) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)). Here, the Court's obligation is made more difficult because there are opposing motions for summary judgment filed in this case. Therefore, the Court must engage in its analysis of these motions carefully to ensure faithfulness to the standards for granting or denying summary judgment.

n6 The Court discussed a number of cases involving potential or threatened injury. The Court cited Steffel v. Thompson, 415 U.S. 452, 39 L. Ed. 2d 505, 94 S. Ct. 1209 (1974), in which the Supreme Court found an actual controversy where a plaintiff was warned twice to stop distributing handbills and was told that, if he continued to pass out the handbills, he would likely be prosecuted. IBP, Inc., 857 F.2d at 427 (citing Steffel, 415 U.S. at 459) ("In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."). The Court stated that "but for the existence of the challenged statute, the petitioner would have continued his leafleting activities; his injury was sufficiently concrete to confer standing. 857 F.2d at 427. The Court also discussed Wilson v. Stocker, 819 F.2d 943 (10th Cir. 1987) in which the Tenth Circuit "found that the plaintiff suffered not only the threat of future prosecution, but an ongoing injury resulting from the statute's chilling effect on his desire to exercise his First Amendment rights." Id. (citing Wilson, 819 F.2d at 946. The Court went even further than these cases, however, in stating that "where plaintiffs allege an intention to engage in a course of conduct arguably affected with a constitutional interest which is clearly proscribed by statute, courts have found standing to challenge the statute, even absent specific threats of enforcement." 857 F.2d at 428. The Court ultimately concluded that because the union plaintiffs

were likely to picket again and engage in conduct violative of the provisions of the statutes at issue yet arguably protected by the Constitution, the plaintiffs were not attempting to obtain an advisory opinion inasmuch as they possessed sufficiently adverse interests to the defendants to create a case or controversy within the jurisdiction of the court. 857 F.2d at 430.

n7 For other cases striking down provisions in statutes, ordinances or city charters as void for vagueness, see Lecci v. Cahn, 360 F. Supp. 759 (E.D. NY. 1973) (vacated on other grounds 493 F.2d 826 (2nd Cir. 1973); see also Gray v. Toledo, 323 F. Supp. 1281, 28 Ohio Misc. 141, 57 Ohio Op. 2d 239 (N.D. Ohio 1971); Rosenfelder v. Huttoe, 156 Fla. 682, 24 So. 2d 108 (Fla. 1945); State Bd. for Elementary & Secondary Educ. v. Howard, 834 S.W.2d 657, 39:6 Ky. L. Summary 37 (Ky. 1992); Huerta v. Flood, 103 Ariz. 608, 447 P.2d 866 (1968); Miami v. Sterbenz, 203 So. 2d 4 (Fla. 1967); Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971).

n8 The Court does not address severability at this point because the Plaintiffs have raised further claims against the validity of § 5.3 beyond the vagueness argument.

n9 As will become clear later, Pickering refers to the case Pickering v. Board of Education, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968) in which the Supreme Court first set out the test to be applied when government employees challenge a restriction, which is a condition of employment, on First Amendment rights. The Pickering balance states that "the problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568.

n10 The Court addresses this argument having already determined that the term "sponsorship" imposes a restriction such that a reasonable person would not be put on notice of the conduct prohibited by the restriction.

n11 Defendants argue that there is no need to apply Pickering in this case because the Supreme Court has already

determined that prospective, content-neutral restrictions directed primarily at political activity as conduct are valid, citing United Postal Workers of American v. Mitchell, 330 U.S. 75, 91 L. Ed. 754, 67 S. Ct. 556 (1947), United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 37 L. Ed. 2d 796, 93 S. Ct. 2880 (1973), and Broadrick v. Oklahoma, 413 U.S. 601, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973). Defendants state that the "combined effect of Letter Carriers and Broadrick is to allow any government, federal, state, or local, to restrict certain political activities by public employees without any specific showing of the necessity for such restrictions." Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment at 7. The Court does not read the holdings in the three cases cited by Defendants so broadly. Broadrick held that the statute in question was not void for vagueness and not substantially overbroad. Pickering was not applied because the restriction on First Amendment rights was facially invalid under the void for vagueness doctrine which rests on the Fourteenth Amendment. Letter Carriers and Mitchell both upheld the validity of the Hatch Act which placed substantial restrictions on the political activities of federal employees. However, despite the existence of these opinions which upheld restrictions on political activity, a recent statement by the Supreme Court in United States v. National Treasury Employees Union has the following to say about why Pickering was not applied in Letter Carriers:

> In [Letter Carriers], we established that the Government must be able to satisfy a balancing test of the Pickering form to maintain a statutory restriction on employee speech. Because the discussion in that case essentially restated in balancing terms our approval of the Hatch Act in [Mitchell], we did not determine how the components of the Pickering balance should be analyzed in the context of a sweeping statutory impediment to speech.

National Treasury Employees Union, 513 U.S. at 467. As in National Treasury Employees Union, the Court believes that because this case involves a City Charter provision that

impacts the First Amendment rights of government employees (although it does so to a lesser extent than the one involved in National Treasury Employees Union because the City Charter provision is limited to City elections), the Pickering test should be applied.

n12 Although Plaintiffs argue that the prohibitions in § 5.3 implicate words and not only actions, § 5.3 clearly reserves to City employees the right to voice their opinions "on all political subjects." Furthermore, because this Court has stricken from § 5.3 the term "sponsorship," the prohibitions in § 5.3 restrain political actions. To the extent that actual speech is restrained, it is restrained only in the sense of active electioneering. Therefore, the arguments in Plaintiffs' briefs notwithstanding, § 5.3 does not strip City employees of their rights to express their opinions on political subjects.

n13 In fact, the Plaintiffs in this case suggest that the problem of political pressure may not be limited to elections for Mayor or City council because the City's employees were gathered together for an informational session on a bond issue for a proposed community center. While no uncontradicted evidence has been given to support Plaintiffs' allegations that this informational session was nothing more than a subtle way of asking City employees to support the bond issue, Defendants' suggestion that this was nothing more than an informational session belies their belief that City employees could be subjected to political pressures were it not for § 5.3. The gathering of City employees together for such an informational session calls into question the concern of City officials about potential for political pressure on its employees.

n14 The Plaintiffs argue that § 5.3 is particularly problematic because its restrictions apply to partisan and non-partisan elections. However, in Magill v. Lynch, 560 F.2d 22, 29 (1st Cir. 1977), cert. denied, 434 U.S. 1063, 55 L. Ed. 2d 763, 98 S. Ct. 1236 (1978), a city charter provision was upheld which barred city employees, including firemen, from being candidates in not only partisan, but non-partisan city elections as well.

n15 To the extent that Plaintiffs seek damages against the City or against Gill in his official capacity, such claims are foreclosed by the Eleventh Amendment. See Long v. Area Manager, Bureau of Reclamation, 236 F.3d 910, 916-17 (8th Cir. 2001) ("The Supreme Court has interpreted the eleventh amendment to mean that 'federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'") (quoting Seminole Tribe v. Florida, 517 U.S. 44, 54, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996) (quoting Hans v. Louisiana, 134 U.S. 1, 15, 33 L. Ed. 842, 10 S. Ct. 504 (1890)); see also Texas Community Bank, N.A. v. Missouri Dept. of Social Services, Div. of Medical Services, 232 F.3d 942, 943 (8th Cir. 2000). Here, there has been no abrogation by Congress of the Eleventh Amendment immunity, and the City has not waived it.

No. 01-2277

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

International Association of Firefighters of St. Louis, Franklin and Jefferson Counties, Local 2665; Lloyd Thompson; and Alma Mendez-Thompson,
Appellants,

v.

City of Ferguson and Allen D. Gill,
Appellees.

May 8, 2002

ORDER DENYING PETITION FOR REHEARING
AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

CONSTITUTION

Article. III.

Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States;–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

No. ~~01-2277~~ 02-540

In the

Supreme Court of the United States

CITY OF FERGUSON,

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS OF ST. LOUIS, FRANKLIN AND JEFFERSON COUNTIES, LOCAL 2665; LLOYD THOMPSON; and ALMA MENDEZ-THOMPSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

John H. Goffstein
Counsel of Record
Jeffrey E. Hartnett
BARTLEY, GOFFSTEIN,
BOLLATO and LANGE, L.L.C.
4399 Laclede Avenue
St. Louis, Missouri 63108
Telephone: 314-531-1054
Facsimile: 314-531-1131
Attorneys for Respondents

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

QUESTIONS PRESENTED

Whether the Eighth Circuit was correct in not deciding the constitutionality of a City Charter without ordering the District Court to first examine the State of Missouri pendent claim and the effect of the Missouri statutory enactments and policy on a City's Municipal Charter Provisions, some of which had been declared void for vagueness, without appeal in this action, as both relate to certain political activity, speech, standing and associational rights subject to State and Federal Constitutional protections, privileges, rights and authority?

Whether, to the extent that a co-plaintiff spouse of a municipal employee asserts her own rights, she maintains standing to engage in direct and/or indirect political activity in relation to placing yard signs or maintaining joint bank accounts with her public employee spouse without suffering economic or compensatory loss?

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STATEMENT OF THE CASE

A. Introduction

This case involves a challenge to a provision of the City of Ferguson Charter which prohibits certain political activities under its Section 5.3 by City employees. Mr. Lloyd Thompson, a Ferguson resident as an employee and his wife, Alma Mendez-Thompson, challenged the constitutionality of the Section. Mr. Thompson was employed as a firefighter. The District Court determined that the Plaintiffs prevailed in their claim that the Charter was void for vagueness to the extent that it prohibits City employees from engaging in "sponsoring", directly or indirectly, candidates for the City office of Mayor or Council.

The action was brought under 42 U.S.C. Section 1983, and alleged that Section 5.3 of the City Charter violated rights guaranteed under the First and Fourteenth Amendments and was also contrary to a provision of the Missouri law, Section 130.028, RSMo., which prohibited cities from forbidding employees to make political contributions and in engaging in otherwise protected partisan activity in regard to candidates for local offices and public issues. Mr. Thompson informed his wife, Mendez-Thompson that she would be unable to run for City Council because of Mr. Thompson's belief that he would lose his job if she became active. Mrs. Thompson alleged that she has not been active in City politics because of her concern that her husband's job would be in jeopardy. No written regulations interpret the City Charter provisions nor do they further define sponsorship or political activity. No mention in the City Charter pertains to the issue of yard signs, although the Missouri Court of Appeals has held that the City Charter was impermissibly vague and

unconstitutional in 1984, because it violated the First Amendment rights, and freedom of speech and association protections of police officers pursuant to the terms of the Missouri Constitution, Article 1, Sections 8 and 9. In that action, the Court determined that the police officers' union had standing as a labor organization to bring the legal action. *Ferguson Police Officers Association v. City of Ferguson*, 670 S.W.2d, 921 (Mo. App. 1984). See also *Missouri National Educational Assoc. v. Missouri State Board of Education*, 34 S.W.3d, 266 (Mo.App. W.D. 2000). The District Court ruled that Alma Mendez-Thompson lacked standing and was not a proper party plaintiff. City administration officials have solicited the support of employees to engage in activities pertaining to non-partisan political activity in relation to, for example, bond issues. The City presented no evidence that it conducted a study, provided standards, guidelines or safeguards to determine the possible impact of allowing employees to speak freely on behalf of candidates for Mayor or City Council. Elections for Mayor and City Council are non-partisan.

In the factual background pertaining to this case, Ms. Mendez-Thompson alleged that the City of Ferguson has threatened to interpret its Charter in such a way as to chill her own exercise of otherwise protected First Amendment rights. Her concerns are that the Charter provisions in question prevent her from participating in political activities such as working in campaign offices or making telephone calls on behalf of candidates because of the discipline to be imposed upon her husband if she either ran for office, electioneered or contributed money to a candidate for either Mayor or the City Council race. The Mayor, in deposition, took the position that if an employee's spouse or children placed a yard sign in front of their residence, they could

be indirectly engaging in political activity otherwise prohibited by the Charter. As such, First Amendment protections are at issue but subject to necessary review on remand in light of the Eighth Circuit's ruling and specific facts of this case in conjunction with the status of Missouri law.

REASONS FOR DENYING THE WRIT

The Eighth Circuit was correct in directing the District Court to redetermine the propriety of the District Court's dismissal of the pendant, or supplemental state claims. The Missouri Statutes Section 130.028 (2001) provide that there shall be no discrimination against any employees or persons in the State of Missouri with respect to employment rights and as such, an employee may not be terminated for contributing to a political candidate. The Court entered this decision in *Guy v. City of St. Louis*, 829 S.W.2d 66 (Mo. App. 1992) after an analysis of both the State law and the statutory and organic contexts. A plain reading of the Missouri law supports the Plaintiffs' position in such respects.

Plaintiffs are well aware of the Court's rulings on the issue of balancing rights to political free speech against any state-wide interest in restricting employees' speech. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947); *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973); and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), but point out that the government must still be able to satisfy a balancing test to maintain a statutory restriction on any employee's

speech. As such, in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Court ruled that in order to survive a vagueness challenge, a "statute must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and 'provide explicit standards for those who apply [the statute]'". The case at bar, as in *United States v. National Treasury Employees Union*, 513, U.S. 454, 466-67 (1995), involves the application of *Pickering* to an impermissible prohibition in the City Charter which restricts all speech of all resident employees (*and their families*) of the entire City. See *City of Ladue, et al., v. Gilleo*, 512 U.S. 43 (1994). That is why the Court sent the case back for remand. Here, there has been no evidence that the City of Ferguson restrictions will support any compelling interest. The Missouri claims under state law are brought under Article 1, and Sections 8 and 25 of the Missouri Constitution.

As the Court held in *Reeder v. Kansas City Board of Police Commissioners*, 733 F.2d 543, 549, (C.A. Mo. 1984), the State of Missouri has the power to make its own legislative choices on such matters providing such choices do not exceed the State's constitutional power under the First Amendment. As to the overall development of the record, in this case, as Judge Loken stated in his concurrence, Plaintiff Lloyd Thompson would have standing to argue the Charter violates his First Amendment protections if he were fired because his wife engaged in political activity to the extent that the Charter would be construed to apply to her political activity. As such, Lloyd Thompson has a First Amendment claim based upon the Charter's chilling effect on his wife's freedom to engage in political activities. This could serve to moot other issues of standing. Although this issue was raised in the District Court, the Plaintiffs, upon remand, would be free to call

it to the Court's attention with formal amendment to the pleadings on the mandated remand. *Foman v. Davis*, 371 U.S. 178 (1962). Nothing new here rises to the level of certiorari review and sound rationale exists for remand and continuing development of the record, if necessary, for reasons of judicial uniformity and economy.

CONCLUSION

Respondent respectfully requests the Court to deny the Writ.

Respectfully submitted,

BARTLEY, GOFFSTEIN, BOLLATO AND LANGE, L.L.C.

JOHN H. GOFFSTEIN, No. 19413
4399 Laclede Avenue
St. Louis, Missouri 63108
Telephone: 314-531-1054
Facsimile: 314-531-1131

Attorneys for Respondent